Petition

81-580

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLGATE-PALMOLIVE COMPANY,
Petitioner

v.

UNITED ROASTERS, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Fourth Circuit's affirmance of the judgment based upon an untried legal theory violate Colgate's Fifth Amendment right of due process and Seventh Amendment right to a trial by jury in conflict with applicable decisions of this Court?

2. Did the Fourth Circuit, by effectively granting summary judgment in favor of United Roasters on a legal theory which had been earlier abandoned by United Roasters and which was neither tried to the jury nor raised on appeal, depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision?

PARTIES BELOW

United Roasters, Inc.—Plaintiff at trial

Colgate-Palmolive Company—Defendant at trial *

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* All of the Petitioner Colgate-Palmolive's domestic subsidiaries are wholly-owned; its foreign subsidiaries are primarily wholly-owned with the exception of a very small number in which there are minority holdings. These are: Colgate-Palmolive, France; Colgate-Palmolive, Morocco; Colgate-Palmolive, Tunisia; Colgate-Palmolive, Etablissements Barbier & Dauphin, Societe Anonyme, France; Colgate-Palmolive, G.m.b.H., Germany; Kao-Colgate Oral Products Company, Ltd., Japan; and The Kendall Company, Societe Continentale des Ouates et Pansements Mulsant S.A., France.

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COLGATE-PALMOLIVE COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

Petitioner Colgate-Palmolive Company ("Colgate") respectfully petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review those portions of the judgment concerning contract performance entered by that Court on May 18, 1981, adverse to Petitioner Colgate and in favor of Respondent United Roasters, Inc. ("United Roasters"). The opinion of the Court of Appeals, ("Fourth Circuit's Opinion" or "Opinion"), reported at *649* F.2d *985*, (4th Cir. 1981) is attached as Appendix A. The Order denying Petitioner Colgate's Petition for Rehearing and Suggestion for Rehearing *In Banc* is attached as Appendix B. The Opinions of the District Court, reported at 485 F.Supp. 1041 (E.D.N.C. 1979) and 485 F.Supp. 1049 (E.D.N.C. 1979), are attached as Appendix C. The District Court's Partial Judgment and Orders are attached as Appendix D.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 18, 1981. A timely petition for rehearing en banc was denied on June 15, 1981, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5, United States Constitution

> No person shall . . . be deprived of . . . property without due process of law; . . . .

Amendment 7, United States Constitution

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

By written contract dated February 1, 1973, Colgate acquired United Roasters' process for manufacturing a roasted soybean snack food which it named "Bambeanos." The contract contemplated two phases: a "test market" phase for a period of two years and a full-performance phase of twenty-five years. The "test market" period was extended by agreement in February, 1976. From 1973 until 1976, Colgate spent millions of dollars to test market Bambeanos by promotion, research and advertising, and sustained an overall net loss on the product of approximately $2,500,000. In the summer of 1976, Colgate informed United Roasters that Colgate had decided to terminate the contract.

The contract gave Colgate the absolute right to terminate upon thirty days notice. United Roasters sued

Colgate in 1977 on several alternate theories. United Roasters' first claim (the notice of termination claim) contended that Colgate's decision to terminate the contract occurred during the first quarter of 1976, but was intentionally withheld from United Roasters until July. United Roasters demanded $9,800,000 in damages on this claim. An alternate claim (the non-performance claim) for $200,000 alleged that if the contract had entered the "post-test-market-performance" phase, Colgate had breached its implied obligation to use its best efforts to market the snack food. United Roasters' pleadings never even hinted at a breach of contract by a failure of Colgate to *test* market.

At trial, United Roasters voluntarily abandoned its non-performance claim at the close of its evidence, and the case was submitted to the jury on the notice of termination claim. The jury found that Colgate had secretly made the decision to terminate and had wrongfully withheld the decision from United Roasters.[1] It awarded United Roasters $571,800.

On appeal to the Fourth Circuit, Colgate argued that since it was not required by the contract to give more than thirty (30) days notice of its decision to terminate, and since North Carolina law did not imply any additional limitation on Colgate's absolute right to terminate, United Roasters' notice of termination theory did not state a claim for relief.

The Fourth Circuit agreed. (Appendix, p. 8a). However, rather than reversing this portion of the trial court's judgment, the Fourth Circuit decided that United Roasters had "misconceived" its case and should have pursued a non-performance theory.[2] (Appendix, pp.

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[1] The issue submitted and the instructions thereon made no mention of any alleged non-performance.

[2] The Fourth Circuit erroneously asserts that United Roasters was forced to an improper election. Appendix, p. 10a. In fact, the record clearly shows United Roasters voluntarily abandoned its

9a-11a). The Fourth Circuit speculated that the jury had found "operative facts" sufficient to support the entry of judgment on non-performance. The Court then affirmed the $571,800 judgment on the ground of non-performance even though that theory had not been pleaded, tried or submitted to the jury and even though no evidence of damages flowing from the alleged non-performance had been introduced at trial. Further, such theory had not been argued against by Colgate's counsel either to the jury, to the trial court or to the Fourth Circuit.

Colgate's Petition for Rehearing and Suggestion for Rehearing *In Banc* was denied June 19, 1981. Colgate now petitions this Court for a Writ of Certiorari.

ORIGINAL BASIS FOR FEDERAL JURISDICTION

United Roasters commenced this action in the United States District Court for the Eastern District of North Carolina pursuant to 28 U.S.C. § 1332(a).

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's affirmance of the judgment based upon an untried legal theory violated Colgate's Fifth Amendment right to due process and Seventh Amendment right to a trial by jury in conflict with applicable decisions of this Court.

It is well settled that where an appellate court determines that a case was tried on an improper legal theory,

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non-performance theory at the close of its evidence. Further, the Fourth Circuit also misapprehended the nature of the pleaded non-performance claim. While United Roasters had pleaded a breach of an implied obligation of Colgate to use its best efforts in the *post*-test market period, the Fourth Circuit described such claim as a breach of an express obligation to use best efforts in the *test* market. Appendix, p. 9a. Thus, to the extent Colgate had notice of a non-performance claim, such notice was for a claim of a substantially different nature than the one conceived by the Fourth Circuit.

it may not grant the equivalent of appellate summary judgment on a new issue "as to which the opposite party had no opportunity to present a defense before the trial court." *Fountain v. Filson*, 336 U.S. 681, 69 S.Ct. 754 (1949) (where defendant won summary judgment below on plaintiff's "resulting trust" theory, court of appeals erred in ordering a money judgment against defendant on personal obligation theory). If, as in the instant case, an appellate court succumbs to the temptation to redetermine facts found by the jury, or to determine facts that the jury had no opportunity to find, the appellate court improperly deprives the litigants of the right to a jury trial of the factual issues, as guaranteed to them by the Seventh Amendment. *See, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 82 S.Ct. 780 (1962) (a court of appeals violates the Seventh Amendment by substituting its view of the facts for the jury's).

In proceeding to a personal money judgment on a theory of which there was no notice to Colgate, no instruction upon by the trial court, no argument by counsel, nor decision by the jury, the Fourth Circuit abandoned any semblance of due process. "Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing." *Ochoa v. Hermandez Y Morales*, 230 U.S. 139, 160, 33 S.Ct. 1033, 1041 (1912).

Requirements of fair hearing include notice of claims of opposing party and opportunity to meet them. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 77 S.Ct. 502 (1957).

This error is strikingly similar to the Fourth Circuit error corrected by this Court in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 78 S.Ct. 893

(1958). Although *Byrd* is recognized as a landmark case because it resolved a long-standing controversy over whether state or federal law governs a litigant's right to a jury trial in diversity cases, it also addressed the question of whether it was appropriate for an appellate court to decide factual issues that were not passed on by the trial court. Part I of *Byrd* clearly holds that where the lower court's ruling or other circumstances at trial result in a decisive issue being withheld from the jury, the correct procedure is to remand the case for trial on that issue. 356 U.S., at 528-533, 78 S.Ct. at 896.

In *Byrd*, a power company lineman employed by defendant's contractor sued for injuries sustained while he was connecting power lines to the defendant's substation. As an affirmative defense, defendant Blue Ridge contended that under South Carolina law the plaintiff was its "statutory employee," and was therefore barred from suing because his exclusive remedy was provided by the South Carolina Workman's Compensation Act. Although the question of whether plaintiff was defendant's "statutory employee" presented a potential jury question, the trial court interpreted the South Carolina Workmen's Compensation Act as precluding Blue Ridge from establishing the defense as a matter of law. Thus Blue Ridge's affirmative defense was not passed upon by the jury.

On appeal, the Fourth Circuit disagreed with the trial court's interpretation of the statute, and ordered judgment entered on behalf of the defendant. *Blue Ridge Rural Electric Cooperative v. Byrd*, 238 F.2d 346 (4th Cir. 1956). Although this Court accepted the Fourth Circuit's interpretation of the South Carolina law, it held that, in proceeding to resolve factual issues and in failing to remand the case for a new trial, the Fourth Circuit erred:

> . . . Implicit in the direction of verdict is the holding that the petitioner, although having no occasion to do so under the District Court's erroneous construction of the statute, was not entitled to an opportunity to meet the respondent's case under the correct interpretation. . .
>
> We believe that the Court of Appeals erred. . . . *[T]he petitioner is entitled to have the question determined by the trial court. This would be necessary even if petitioner offered no proof of his own.* Although the respondent's evidence was sufficient to withstand the motion [to strike the affirmative defense] under the meaning given the statute by the Court of Appeals, it presented a fact question which . . . is properly to be decided by the jury . . .
>
> 356 U.S. at 531-532, 78 S.Ct. at 897-898. (Emphasis added).

Noting that "on the entire record" the jury "might reasonably reach an opposite conclusion from the Court of Appeals as to the ultimate fact," this Court concluded:

> At all events, *the petitioner is plainly entitled to have an opportunity to try the issue under the Court of Appeals' interpretation.*
>
> 356 U.S. at 532, 78 S.Ct. at 898 (Emphasis supplied.)

See also, Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 79 S.Ct. 1184 (1959) (court of appeals' holding, based upon a jury interrogatory whose answer was imprecise in light of legal point at issue, reversed so that material factual questions could be decided by the jury).

The Fourth Circuit's Opinion of 18 May 1981 accepts Colgate's trial and appellate contention that this case was tried, argued and submitted to the jury on an untenable theory. Yet Colgate has been denied the only appropriate relief which is the opportunity to defend itself at a trial grounded on a correct legal theory. The Fourth Circuit's

Opinion has unjustly deprived Colgate of its precious, fundamental right of an opportunity to try the issue of non-performance and to have the jury resolve the material factual issues.

It is appropriate for this Court to note that there were numerous issues of material fact hotly disputed by the parties at a trial of over three weeks. No issue relating to Colgate's alleged non-performance claim was submitted to the jury. Thus, as held in *Byrd*, Colgate is clearly entitled to a jury trial on this issue. This is so regardless of whether Colgate put on evidence or had the opportunity to do so.

Finally, even though no issue relating to Colgate's alleged non-performance of the contract was submitted to the jury, the Fourth Circuit's Opinion nonetheless recites as fact several of United Roasters' contentions relating to performance even though these contentions were disputed by Colgate. (Appendix, pp. 3a-4a). The Fourth Circuit fails to recite Colgate's evidence. For example, at pages 4-5 of its Opinion the Fourth Circuit states: "Colgate ceased production of [the snack food] in January, substantially stopped advertising in February, transferred its product manager to another project in March, and had sold its entire inventory of raw soybeans and [the snack food] in May." (Appendix, p. 4a). Colgate's evidence, however, showed that (a) United Roasters produced the snack food at Colgate's direction during April and May of 1976; (b) Colgate bought newspaper coupon ads for the snack food in 37 New England newspapers during May and June, 1976; (c) the project manager's duties were promptly reassigned; (d) Colgate had an adequate inventory of raw Soybeans; and most importantly, (e) the very purpose of the *test* marketing of a new product involves some periods of no advertising and promotion of the product to determine its residual sales vitality (i.e., whether the product is attrac-

tive enough to cause repeated sales after withdrawal of the introductory advertising and promotion which achieved the introductory sales). The jury never resolved these or the other factual disputes as to performance of test marketing by Colgate. Hence, the Fourth Circuit's adoption of United Roasters' contentions as the facts of the case completely distorts the record of the case and makes its speculation as to what "operative facts" the jury may have found completely erroneous. Finally, it is indisputable that the issue of performance was not tried to the jury. Colgate did not defend against this theory of the case or anything close to it.

For all the above reasons, the Fourth Circuit's affirmance of the judgment against Colgate on the theory of non-performance clearly violated Colgate's Fifth Amendment right to due process and Seventh Amendment right to a trial by jury.[3]

II. The Fourth Circuit, by effectively granting summary judgment in favor of United Roasters on a legal theory, which had been earlier abandoned by United Roasters and which was neither tried to the jury nor raised on appeal, departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The Fourth Circuit's bizarre proceedings cry out for this Court to exercise its supervisory power. The question of whether the trial court's judgment would be affirmed on the ground of non-performance was not briefed by either party on appeal nor was it raised by

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[3] It is also appropriate to note that neither party presented any evidence as to the amount of damages, if any, flowing from the alleged non-performance. Rather, the Fourth Circuit apparently assumed that damages from the theory of non-performance were the same as those from the theory of failure to give prompt notice. In its pleadings however, United Roasters only requested $200,000 in damages for non-performance while it sought $9,800,000 for withholding notice of termination, a difference by a factor of 49.

the panel at oral argument. The panel's decision thus was based on a ground against which Colgate had absolutely no notice to defend.

Further, once it determined that United Roasters' counsel "misconceived" their case, the Fourth Circuit in effect recast the pleadings, tried the case to itself, made plaintiff's argument to the jury and awarded judgment on a theory it perceived as correct. No notice or opportunity to be heard was given to the party aggrieved by this effective grant of summary judgment on appeal; nor was the Fourth Circuit concerned that none of the numerous issues of material fact concerning performance was submitted to the jury. Further, the Fourth Circuit's assertion that the jury found the "operative facts" of non-performance is erroneous. Neither was such issue submitted to the jury, nor was such a finding necessary for the jury to answer the termination issue that was submitted.[4] Rather, the Fourth Circuit terminated the case *sua sponte* without regard to the Rules of Civil Procedure, common-law and statutory limitations on its appeliate powers, or any modicum of due process of law.

The Fourth Circuit's Opinion indicates that although counsel for United Roasters "misconceived" the case and although the trial court submitted the case to the jury on an untenable theory, Colgate is deemed to have anticipated and defended against a tenable theory. It is difficult enough for counsel to defend a large, out-of-state corporation against a small local company before a local jury, but it is simply impossible for counsel to defend any client before an appellate court that proceeds as the Fourth Circuit did. The procedures embodied in

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[4] The Court instructed on that issue that the jury must find Colgate decided to terminate and *wrongfully withheld* such decision from United Roasters. The jury in answering this issue for the plaintiff likely could have concluded Colgate *continued* performance in order to hide the decision from United Roasters.

the Fourth Circuit's Opinion constitute such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the above reasons, Colgate respectfully requests that a writ of certiorari be issued to the United States Court of Appeals for the Fourth Circuit to review those portions of its judgment concerning contract performance.

This the 14th day of September, 1981.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1139

UNITED ROASTERS, INC.,
Appellee,

versus

COLGATE-PALMOLIVE COMPANY,
Appellant,

STATE OF NORTH CAROLINA,
Amicus Curiae.

No. 80-1184

UNITED ROASTERS, INC.,
Appellant,

versus

COLGATE-PALMOLIVE COMPANY,
Appellee,

STATE OF NORTH CAROLINA,
Amicus Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh, Herbert N. Maletz, Judge, United States Customs Court, sitting by designation

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Argued December 2, 1980 Decided May 18, 1981

Before HAYNSWORTH, Senior Circuit Judge,
FIELD, Senior Circuit Judge, and
HALL, Circuit Judge

George W. House, L. P. McLendon (Reid Phillips, Brooks, Pierce, McLendon, Humphrey & Leonard on brief) for United Roasters, Inc.; William H. McCullough, H. Hugh Stevens, Jr. (J. Allen Adams, Charles C. Meeker, Sanford, Adams, McCullough & Beard on brief) for Colgate-Palmolive Company; (Rufus L. Emisten, Attorney General, Alan S. Hirsch, Assistant Attorney General, on brief) for Amicus Curiae.

HAYNSWORTH, Senior Circuit Judge:

United Roasters, Inc., a North Carolina corporation, and the Colgate Palmolive Co., a Delaware corporation, filed cross appeals from the judgment in this diversity action for breach of contract. The jury found that Colgate had broken three different contractual obligations, including an implied obligation to exercise in good faith an unqualified right to terminate the contract, and awarded United Roasters damages totaling $789,000. The district court held, however, that the breach of the implied good faith covenant was not an unfair or deceptive act or practice in the conduct of commerce within the meaning of N.C.G.S. § 75-1.1, and declined to award treble damages under § 75-16. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C.

1980).[1] Although we believe that United Roasters misconceived the theory of a common-law branch of this case, we find that the district court reached the correct result, and affirm its judgment.

I.

In a contract executed in 1973, Colgate obtained the right to manufacture and distribute Bambeanos, a roasted soybean snack developed by United Roasters. The contract provided for an initial test-marketing period of two years, followed by twenty-five years of full performance. Different terms as to royalties, right to terminate, and reconveyance of assets prevailed during these two periods, with terms more favorable to United Roasters effective during the latter twenty-five years. In February 1976, however, United Roasters agreed to an indenfinite extension of the test-marketing period, in exchange for Colgate's agreement to repay United Roasters' promissory note, in the amount of $88,000, to the Cameron-Brown Capital Corporation. During the test-marketing period, Colgate was entitled to terminate performance in its sole discretion on thirty days written notice to United Roasters.

From late 1973 through the spring of 1976, Colgate tested Bambeanos in Syracuse, New York, and the Boston area. Although Colgate did not realize a profit, the product garnered a substantially larger dollar share of these markets than anticipated. Bambeanos seemed slated for permanent marketing until December 1975, when Colgate publicly announced its plans to merge with Riviana Foods, Inc., a large food processing company. In the ensuing months, Colgate officers and employees exchanged a series of internal memoranda discussing the possible termination

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[1] An earlier decision on a motion for partial summary judgment on the treble damage issue is reported at 485 F. Supp. 1041 (E.D.N.C. 1979).

of the United Roasters contract, in light of the imminent availability of Riviana's facilities. Although there is no direct evidence that Colgate decided to terminate at that time, Colgate ceased production of Bambeanos in January, substantially stopped advertising in February, transferred its product manager to another project in March and had sold its entire inventory of raw soybeans and Bambeanos by May.

The Riviana merger was approved by the Federal Trade Commission and the companies' boards of directors and shareholders by June 1976. On July 19, Colgate orally advised United Roasters that it was terminating the contract. The termination was confirmed in writing on August 27. United Roasters requested reconveyance of its assets, together with any improvements, pursuant to the terms of the contract, but Colgate refused to reconvey unless certain additional conditions were met. Ultimately, Colgate neither returned United Roasters' assets, including its production facilities, nor paid the obligation to Cameron-Brown.

Unable to resolve their dispute through negotiation, United Roasters resorted to this diversity action. It sought recovery on a number of theories, several of which are irrelevant here. United Roasters did allege, however, that Colgate decided to terminate in early 1976 and failed to give timely notice, contrary to both the express provisions of the contract and an implied obligation to exercise the right to terminate in good faith. United Roasters sought both contractual damages and treble damages, arguing that this conduct was an unfair or deceptive commercial practice as defined in N.C.G.S. § 75-1.1. In addition, United Roasters charged that Colgate was liable for its failure to reconvey the assets and to pay the Cameron-Brown note.

After an extensive trial, the district judge submitted questions to the jury for a special verdict. The jury

found that Colgate wrongfully refused to reconvey United Roasters' assets, for which it was liable in the stipulated amount of $130,000. Moreover, the jury concluded that Colgate had agreed to pay the Cameron-Brown note without an expectation of repayment out of royalties or otherwise. Damages for this breach were stipulated at $88,000. Finally, the jury found that Colgate acted in bad faith in exercising its right to terminate the contract. The jury concluded that Colgate had decided to terminate in the first quarter of 1976 and that its failure to give reasonably prompt notice, although not deceptive, was unfair. The jury awarded United Roasters $571,000 after subtracting damages which reasonably could have been avoided.

The district judge entered partial judgment on the jury's verdict. The court declined, however, to award treble damages, reasoning that Colgate's breach of its implied obligation of good faith was neither an act or practice in the conduct of commerce, nor unfair or deceptive, within the meaning of § 75-1.1.

II.

On appeal the parties principally contend about the existence in North Carolina of a good faith limitation upon the exercise of an unconditional right of contract termination. Colgate maintains that there is no such limitation, while United Roasters insists that there is, and that a violation of the good faith limitation is an unfair commercial practice within the meaning of § 75-1.1 so as to require a trebling of the damages. Since the question of the existence of any such limitation is unillumined by the North Carolina decisions and since its application in this context would be highly questionable anywhere, we think the thrust of the plaintiff's claim was largely misconceived.

There is nothing wrong with the general principle. Dean Roscoe Pound observed, "[i]n civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith." 3 R. Pound, Jurisprudence 10 (1959). During the last fifty years, a requirement of good faith dealing has emerged as a general principle of contract law. It is recognized in a majority of jurisdictions and in leading model codes. *See* Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980); Holmes, *Is There Life After Gilmore's Death of Contract?—Inductions from a Study of Commercial Good Faith in First-Party Insurance Contracts*, 65 Cornell L. Rev. 330 (1980); Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968). It has been recognized by the North Carolina Court of Appeals, *Weyerhaueser Co. v. Godwin Building Supply Co.*, 40 N.C. App. 743, 253 S.E. 2d 625 (1979), and by this court, *de Treville v. Outboard Marine Corp.*, 439 F.2d 1099 (4th Cir. 1971).

In *de Treville*, we applied the principle to the termination of a franchise agreement. The franchisee for the sale and servicing of Evinrude Motors allegedly had built up a substantial business and a large inventory of parts and machines for servicing them. When the manufacturer, without offering to purchase the inventory and equipment, terminated the franchise and awarded it to a competitor, we held, under settled South Carolina law, that the manufacturer's action was subject to the limitation of the good faith principle. There is, however, a substantial difference of opinion as to the application of the principle to unconditional rights of contract termination. *Compare, e.g., Busam Motor Sales v. Ford Motor Co.*, 203 F.2d 469 (2d Cir. 1953); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 365 N.E.2d 1251 (1977); *J. R. Watkins Co. v. Rich*, 254 Mich. 82, 235

N.W. 845 (1931); *and Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) *with Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940); *A & M Fix-it, Inc. v. Schwinn Bicycle Co.*, 494 F.2d 175 (D. Utah 1980); *and Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co.*, 470 F. Supp. 1308 (N.D.N.Y. 1979). Perhaps the application should vary with the context. When termination is oppressive, when it would frustrate expectations reasonably held, though unsecured by express contractual agreements and when it will impose substantial losses upon the other party, application of the principle may well be called for; in other contexts, an exercise of an unqualified right of termination should best be left to a determination of his own best interest by the party possessing the right.

We find no guidance in North Carolina cases. In *General Tire & Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960) and *City of Gastonia v. Duke Power Co.*, 19 N.C. App. 315, 199 S.E.2d 27 (1973), the North Carolina courts applied the traditional rule that an absolute right to terminate may be freely exercised, but apparently a good faith limitation theory was not urged in either case. In *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (1978), the North Carolina Court of Appeals declined to recognize a tort of "retaliatory discharge" and adhered to the traditional rule that a contract of employment at will is terminable by either party without regard to just cause. We need not speculate, however, about whether North Carolina might recognize the principle in contract termination cases or how those courts might apply it if the principle is recognized in some circumstances. The facts here do not call for a resolution of the question.

The case was submitted to the jury on the theory that bad faith inhered in a decision by Colgate early in the year to terminate the contract without promptly com-

municating its decision to United Roasters.[2] In answer to special interrogatories, the jury found that Colgate had decided during the first quarter of the year to terminate the contract, and it is undisputed that United Roasters was uninformed of that decision until mid-July. The ultimate finding was bad faith on Colgate's part in not communicating its decision promptly to United Roasters.

Whatever may be said in favor of an application of the limiting principle to an exercise of an unconditional right of termination, there is very little to be said in favor of law that good faith requires one possessing a right of termination to inform the other party promptly of any decision to exercise the right. A tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do. The tenant, however, may not stop paying rent when he comes to an early decision to terminate the lease later; he is obliged to pay the rent through September.

What is wrong with Colgate's conduct in this case is not its failure to communicate a decision to terminate arrived at before the end of March, but its cessation of performance. Clearly it had an obligation of good faith performance up until its right of termination was actually effective. The contract expressly obligated it to use its best efforts in the promotion of Bambeanos. Instead of doing that, it simply ceased its performance. It stopped manufacturing Bambeanos. It ended its advertising campaign in Boston and in Syracuse and sold its inventory. Quite simply, it broke its contract when it

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[2] Colgate contended it did not finally decide to terminate the contract until after final approval of its acquisition of Riviana Foods in June.

terminated its performance, which was United Roasters' contractual due.

North Carolina law does require that parties perform their contractual obligations in good faith. *See Weyerhaeuser, supra; Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973). Colgate did not do that, and is responsible to United Roasters in resulting damages.

In *de Treville*, the substantial economic losses visited upon the franchisee by the manufacturer's termination of the franchise would have been uncompensable except for the application of the good faith principle to the manufacturer's exercise of its contractual right. It is perhaps a principle of last resort to adjust economic harm wrongly or unconscionably inflicted. In an ordinary breach of contract claim such as this, in which the economic losses are compensable under traditional principles, the reason for the emerging principle is simply not present, for United Roasters' economic losses are compensable under the traditional principles. *See* Holmes, *Is There Life After Gilmore's Death of Contract?—Inductions from a Study of Commercial Good Faith in First-Party Insurance Contracts*, 65 Cornell L.Rev. 330 (1980).

III.

Though this branch of the case was not submitted to the jury on a simple contract breach theory, we may affirm on that basis.

A.

In Count 1 of its complaint, United Roasters had alleged its theory of bad faith in the exercise of Colgate's right of termination, but in Count 3 it alleged nonperformance of Colgate's express contract obligations. At the conclusion of the presentation of plaintiff's case, however, it was required by the court to make an election between the two theories. It elected to proceed upon the

theory upon which Count 1 was based. Having made that election, it made no objection to the jury instructions on the ground that they omitted to submit the case on the theory of Count 3.

The plaintiff was wrongly forced to make the election it did. Rule 8(e)(2) of the Federal Rules of Civil Procedure permits the pleading of alternative or inconsistent claims, while Rule 15(b) authorizes the amendment of the pleadings to conform to the evidence produced at trial. Rule 54(c) requires the court to grant relief to which a prevailing party is entitled, though unrequested in a pleading. "Ordinarily, a plaintiff may pursue alternative remedies, however 'inconsistent,' with final 'election' postponed to a late stage of the action—after the proof is in or even after the fact-finder, court or jury, has made its findings on both alternatives." Restatement (Second) of Judgments § 61.1, Comment m, at 174-175 (Tent. Draft No. 5, 1978).

Of course, the legal theories exemplified by Counts 1 and 3 of the complaint were not in the least inconsistent. They were simply alternative theories based upon the same set of operative facts. To the extent that each theory had legal validity as applied to the operative facts, the plaintiff was entitled to have both theories submitted to the jury, and should not have been required to make the election it did. *Breeding v. Massey*, 378 F.2d 171 (8th Cir. 1967). Having been erroneously forced to make that election, however, it surely was not incumbent upon United Roasters to reassert its objection to the jury instructions on the ground that they did not submit the theory of Count 3. Rule 51 does not require us to ignore the deficiency of the jury instructions for failure to include a legal theory the plaintiff had erroneously been forced to abandon.

B.

The direct evidence of nonperformance by Colgate is the circumstantial evidence upon which United Roasters attempted to found its bad faith termination claim. Though the theory, we think, was misconceived, Colgate had every opportunity to offer all countervailing evidence it possessed and every incentive to do so. Moreover, it is clear that the jury found the operative facts leading to the legal conclusion of nonperformance by Colgate. We may affirm a judgment of a district court upon a ground neither relied upon by the district court nor urged upon it at trial, and we need not remand this case for redetermination of the factual issues already resolved by the jury's verdict.

IV.

We think the district court properly denied treble damages on this phase of the case.

Section 75-1.1 makes unlawful unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Under 75-16 a person injured by such acts is entitled to treble damages.

There is indication in *State Ex Rel. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977), that the North Carolina Supreme Court thought that the "commerce" contemplated by 75-1.1 was the sale of goods, and the trial judge denied treble damages in reliance on that case since he concluded that the contract here did not involve the sale of goods. Later, however, the North Carolina Supreme Court broadened its interpretation of the meaning of "commerce" in that section. In *Johnson v. Phoenix Mutual Life Insurance Company*, 300 N.C. 297, 266 S.E.2d 610 (1980), it held that a contract between a mortgage broker and a borrower for the exclusive right to place permanent mortgage financing was in commerce within the meaning of the statute, though

it upheld summary judgment for the mortgage broker on the ground that there was no warrant for a finding that any unfair or deceptive act or practice had been committed. Quite recently, however, the Supreme Court of North Carolina in *Marshall v. Miller*, —— N.C. ——, —— S.E.2d —— (April 7, 1981), put a different gloss upon the statute. It was repeatedly described as an act for the protection of consumers, and the treble damages provision of § 75-16, it said, was intended to create an effective private remedy for aggrieved consumers. In that context, the provision of treble damages is surely understandable.

In *Marshall*, however, the earlier decision in *Johnson* was not overruled or repudiated. If the North Carolina statute was intended only for the protection of consumers purchasing goods and services, it is difficult to understand its application to a developer of a shopping center seeking more than two million dollars in mortgage financing. Arguably, under *Johnson* sophisticated business concerns like United Roasters may be within the Act's protection, and the contract between it and Colgate may be commerce within the meaning of the statute.

The district court was also of the opinion that the statute was inapplicable here because it found that Colgate had not been intentionally unfair or deceptive. That conclusion, however, is substantially undercut by the recent decision in *Marshall*. There, it was held that purchasers of mobile homes and leases of space upon which to maintain them were the victims of misrepresentations about facilities and services to be provided by the park's owner. The court held that it was no defense that the owner's representations had been made in good faith. Under the statute, one is only to look at the impact upon the victim or victims. The owner had not complied with the representations, and, however, innocent his intentions at the time he made them, the victims of those misrepresentations were entitled to trebled damages.

The context of this case is far from that in which people acquire mobile homes and the rights to place them upon lots in mobile home parks, but, if the statute is applicable here, *Marshall* strongly suggests that the fact that Colgate may not have intended to be unfair or deceptive is no defense.

Remaining to be determined, however, is whether Colgate's acts were unfair or deceptive within the meaning of § 75-1.1. It is clear that the statute encompasses such things as misrepresentation and a wide variety of shady practices sometimes associated with the marketing of consumer goods and services. Whatever the limit of their reach, however, the words must mean something more than an ordinary contract breach.

In a sense, unfairness inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted, but this is why remedial damages are awarded on contract claims. If such an award is to be trebled, the North Carolina legislature must have intended that substantial aggravating circumstances be present. The statute outlaws unfair competition, and the unfair acts and practices made unlawful include acts or practices not aptly described as deceptive. The North Carolina Supreme Court in *J. C. Penney*, in dicta, listed a number of acts or practices thought to be representative of those things proscribed by the statute. They are actually deceptive or approach deception. In each instance, the deception or unfairness was present at the time of contract formation. Those acts and practices were quoted by Judge McMillan in *CF Industries, Inc. v. Continental Gas Pipe Line Corp.*, 448 F. Supp. 475 (W.D.N.C. 1978), when he adopted a limited construction of the North Carolina statute. He concluded that an intentional breach of a valid contract was not a violation of the statute.

Under the jury's resolution of the facts, Colgate's violation of its contractual obligation was an intentional breach, but there was neither unfairness nor deception in formulation of the contract, and the jury found no deception in the circumstances of its breach. The contract here was carefully negotiated and drawn by sophisticated parties. There is no hint of any unfairness to either party before Colgate's cessation of performance. It then broke the contract, but we cannot conclude that unfairness inhered in the circumstances of the breach within the meaning of the statute simply because the breach was intentional and not promptly disclosed.

V.

Colgate has several other contentions, only two of which merit our notice.

The jury's award of $571,000 on this phase of the case was based upon the testimony of an expert witness who undertook to value the Bambeanos business as a going concern before Colgate's abandonment of it. It is doubtful that United Roasters had the financial resources to take over that business and pursue it, but surely it was entitled to the opportunity to attempt to arrange the necessary financing and to earn the future profits that might reasonably have been expected. At the time, the business had earned no profits, but Bambeanos had captured a larger share of the market in Boston and in Syracuse than initially had been expected, and the jury might reasonably have found, as it did, that further promotion and development would produce future profits. The initial losses from start-up costs in attempting to penetrate those two markets were largely over, and market projections predicted future profits. The plaintiff's expert offered a reasoned estimate of future profits and, by the application of a discount earnings method, arrived at an amount which, in his opinion, a willing buyer would be prepared to pay for the business.

In none of this do we find error or unfairness to Colgate. By letting the business run out, Colgate had deprived the plaintiff of an opportunity to sell the business as a going concern or to develop it on its own. Because of Colgate's acts, the calculation of the damages was necessarily dependent upon calculations and estimates of experts in the field. There was adequate support in the record for those calculations and estimates, and the jury was sufficiently informed of the bases of the expert's opinion to assess the weight of the evidence. *See* Federal Rule of Evidence 705; *Story Parchment Co. v. Patterson Paper Co.*, 282 U.S. 555 (1931); *Pipkin v. Thomas & Hill, Inc.*, 288 N.C. 278, 258 S.E.2d 778 (1979).

Finally, Colgate argues that the $130,000 award for failure to return the physical equipment was duplicated in the award of termination damages. That there was any such duplication is simply speculative, however. No question was put to the jury about any possible duplication before its discharge, and we find no basis for rejection of any part of its verdict.

Affirmed

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 80-1139/1184

UNITED ROASTERS, INC.,
Appellant and Cross-Appellee

versus

COLGATE-PALMOLIVE COMPANY,
Appellee and Cross-Appellant

[Filed June 19, 1981]

ORDER

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing *en banc*, and with the concurrence of Judges Field and Hall,

IT IS ORDERED that the petition be, and it is hereby, denied.

/s/ Charles F. Haynsworth
Senior Circuit Judge

June 15, 1981

APPENDIX C

UNITED STATES DISTRICT COURT
E. D. NORTH CAROLINA
RALEIGH DIVISION

No. 77-184-CIV-5

UNITED ROASTERS, INC.,
Plaintiff,

v.

COLGATE-PALMOLIVE COMPANY,
Defendant.

July 13, 1979

MEMORANDUM OF DECISION

DUPREE, District Judge.

Plaintiff United Roasters, Inc. (UR) alleges in this diversity action that it was damaged by the wrongful conduct of a well-known conglomerate, Colgate-Palmolive Company (Colgate), when UR contractually transferred to Colgate all of its assets and process rights in the production of various snack foods. The complaint contains seven counts. Defendant Colgate has moved for partial summary judgment dismissing Counts 4 and 5. Count 4 alleged unfair trade practices and deceptive acts in violation of North Carolina General Statutes § 75-1.1 (1969 Repl. Vol.) Count 5 alleged a restraint of trade in violation of N.C.G.S. §§ 75-1 and 2.

The court has studied 1,626 pages of depositions, 74 pages of answers to interrogatories, 29 pages of briefs and hundreds of pages of exhibits filed in support of and in opposition to the motion for partial summary judgment. This examination shows that substantial variance

exists between the UR and Colgate versions of what occurred during the negotiation, formation, performance and termination of the contract; genuine issues of material fact reman to be decided at trial. Accordingly, Colgate's motion for partial summary judgment will be denied.

However, Colgate's motion for partial summary judgment also attacks the legal theories set forth in Counts 4 and 5 as applied to the facts as alleged by UR. In this respect, Colgate's motion more closely resembles a motion to dismiss for failure to state a claim for which relief can be granted, although it is labeled a motion for partial summary judgment. Nevertheless, the court will proceed to determine the legal sufficiency of UR's allegations; a court may treat a motion for summary judgment as a motion to dismiss when it is concerned only with the sufficiency of the allegations within a count and not with factual material. *Grzelak v. Calumet Publishing Company, Inc.*, 543 F.2d 579 (7th Cir. 1975); F.R. Civ.P. 1.

I. *Factual Background as Alleged by Plaintiff UR*

Plaintiff is in the business of producing and distributing various roasted soybean and corn snacks from its plant located in Clayton, North Carolina. Interested in expansion of the marketing of its product, UR approached Colgate in October of 1972 for the purpose of negotiating a Colgate takeover of the marketing of UR's roasted snacks. The negotiations yielded roughly the following agreement: Colgate was to be permitted to study the soybean market and various manufacturing techniques. At the end of the study period, Colgate would decide whether to enter a test soybean market. Should Colgate decide to do so, it would pay UR four per cent of the test market sales, with a minimum payment of $100,000 and a maximum payment of $200,000 over the life of the test market. UR alleges that the test market was not to exceed two years, beginning on September 1, 1973, and ending

on September 1, 1975. In exchange for the four per cent royalty payment, UR was to transfer all of its assets, icluding the right to the roasted soybean snack process, to Colgate. After the transfer, UR was to be retained as an independent contractor for the purpose of actual manufacture of the roasted soybean snacks. If Colgate decided not to expand the test market at the end of the two-year period, the contract would "terminate" and the rights and assets transferred to Colgate would be returned to UR.

The parties further agreed that if Colgate continued to market the roasted soybeans after the end of the two-year period (September 1, 1975), Colgate would pay UR over a twenty-five-year period the greater of four per cent of gross sales dollars (but not more than $200,000 each year) or seven per cent of gross profits after deducting the first two million dollars of gross profits each year. Colgate further agreed generally to be liable for all debts arising from UR's manufacture of the snacks, but would take UR's assets free and clear of any prior debts. Colgate was granted sole discretion to terminate the agreement at any time within the two-year period between September 1, 1973 and September 1, 1975 upon thirty days' written notice to UR. Colgate was also given the right to discontinue marketing the roasted soybeans at any time subsequent to the two-year period upon thirty days' written notice to UR. If Colgate decided to terminate the agreement, Colgate agreed to reconvey to UR all the assets transferred to it by UR on an "as is" basis at the time of the reconveyance, plus existing improvements, additions, repairs or replacements. In exchange, UR agreed to pay to Colgate the total net book value of all improvements and additions to the assets covered by the original conveyance.

The shareholders of UR approved the contract on February 1, 1973. On March 28, 1973 Colgate had completed

its initial studies and exercised its right to purchase all the assets of UR and to begin test marketing. UR cancelled all existing brokerage contracts, liquidated its stocks and notified all direct purchasers that production would be discontinued. From that point on, UR was effectively employed solely by Colgate to manufacture roasted soybean snacks for the sole use of Colgate in its distribution efforts during test marketing.

Colgate gave the brand name of "BAMBEANOS" to the roasted soybean snack produced by UR and set up timetables for the actual test marketing of this product in various parts of the country. Meanwhile, in 1974 Dr. Maurice Hoover of North Carolina State University began working as a consultant in the development of a new snack product called "JIMMY CRACK CORN", a roasted corn kernel snack. UR presented JIMMY CRACK CORN to Colgate for consideration as a possible additional product. Experimentation and control taste-testing by Colgate indicated that JIMMY CRACK CORN could be very competitive in the snack food market.

In the meantime, test-marketing of various flavors of BAMBEANOS continued. UR alleges that BAMBEANOS' average share of the snack nut market was "unexpectedly and encouragingly high." UR further alleges that JIMMY CRACK CORN experienced the same success as BAMBEANOS. However, notwithstanding the apparent success of both BAMBEANOS and JIMMY CRACK CORN in the test marketing phase, UR alleges that Colgate in bad faith began certain deceptive practices which in the end destroyed UR's business. According to UR, Colgate's senior management secretly decided not to expand from the test market phase of the contract and to discontinue all efforts to market a soybean snack after January of 1976, but at the same time not to terminate UR's contract at the end of the test market phase, September 1, 1975. On the basis of written assurances by

Colgate, UR claims that it was led to believe that Colgate intended to expand the marketing of the snacks. UR alleges that Colgate made the secret decision to discontinue marketing, but at the same time continue the contract, for three basic reasons:

(1) Colgate realized that disclosure of such a decision would cause UR to cease production of JIMMY CRACK CORN, which Colgate needed to complete the test marketing of this apparently lucrative snack food;

(2) Colgate desired to extend the time of the agreement as far as possible beyond the guideline date of September 1, 1975 in order to create an appearance that it had entered the last phase of the contract and thus force UR to purchase Colgate's additions and new equipment before it could resume production; and

(3) Colgate sought to prevent UR from resuming production of products which would be in direct competition in the snack food market with Colgate's newly-acquired subsidiary, Rivianna Foods.

UR alleges that during the time between January and July, 1976, Colgate at no time gave the thirty-day notice of termination as required by the contract.

Colgate first told UR on July 19, 1976 that it had previously decided not to expand the test market or in any manner continue marketing of roasted soybean snacks. Colgate allegedly told UR that, in spite of the certain profitability of BAMBEANOS, Colgate was not interested in any product which created less than fifteen million dollars in annual gross sales. UR's basic position at that time was that a fifteen-million-dollar objective was known to be unobtainable by all parties at the time of the original negotiations and that had that goal been disclosed, the shareholders of UR would never have wasted three years by entering into the Colgate contract. UR then demanded that Colgate terminate the contract,

return the plant and equipment to UR, and allow UR to resume independent production and marketing of roasted soybean snacks. Colgate refused and stated that Colgate had just recently acquired a new subsidiary, Rivianna Foods, which was extensively involved in the snack food market, and that Colgate intended to give Rivianna an opportunity to review the BAMBEANOS test market data. Colgate apparently felt that it would be better equipped to handle a relatively low volume product through a subsidiary rather than on an independent contractor basis through the parent company.

Colgate notified UR on August 24, 1976 that Rivianna Foods had decided against marketing UR's roasted soybean snacks. Moreover, Colgate further told UR to dismiss its work force and to end all expenditures because Colgate would no longer pay operation costs as required by the contract. Again UR demanded that Colgate return its assets "plus then existing improvements." Colgate proposed in the alternative that the entire business be sold and the proceeds be divided between the parties. When UR continued to object and threatened legal action, Colgate allegedly reminded UR of its pre-contract note with Cameron-Brown of $100,000 due in October of 1976 which UR had no funds to pay and which the individual shareholders of UR had personally guaranteed. UR's most bitter allegation is that Colgate had previously agreed to cover the note if test-marketing delay disrupted royalty payments anticipated during the first year of the 25-year performance period. (Colgate specifically denies maneuvering UR closer to the default date on the Cameron-Brown note in order to give itself an unfair leverage in termination negotiations.)

Efforts by Colgate and intensive negotiations by UR failed to produce a buyer for the business. In the meantime, Cameron-Brown demanded payment on the $100,000 note. Colgate again refused to pay the note for UR, stating that the only way UR would get any money was to

find a buyer for the business. No buyer having been found, the guarantors of the note, the individual shareholders of UR, made payment on the note in June and July of 1977. UR alleges that the end result of Colgate's alleged unconscionable activities is simple: UR's business and the financial standing of its individual shareholders has been reduced to shambles. Moreover, the market now has one less competitor in the roasted soybean market, whether that competitor be UR, Colgate-Palmolive or Rivianna Foods.

II. *Alleged Unfair and Deceptive Acts*

United Roasters contends that the above-described actions by Colgate violate the North Carolina Unfair Trade Practices Act:

> "methods of competition, acts and practices regulated; legislative policy—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> "(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State." N.C.G.S. § 75-1.1 (1975 Repl. Vol.).

Colgate has the burden of proof with respect to its claim that it is exempt from the provisions of the Act. N.C.G.S. § 75-1.1(d) (1975 Repl. Vol.). In an effort to carry that burden, Colgate alleges three factors which it claims to show that its actions as alleged by UR are not proscribed by the statute.

First, Colgate contends that the scope of Section 75-1.1 concerns only sales involving individual con-

sumers and not two or more business corporations of equal bargaining power. However, the plain wording of the statute reveals otherwise. Section 75-1.1 provides a civil remedy for unethical practices *between persons engaged in business.* Accordingly, the statute would apply to a bulk sale of a business' assets as much as it would to a consumer sale. *Harrington Manufacturing Company, Inc. v. Powell Manufacturing Company, Inc.*, 38 N.C.App. 393, 248 S.E.2d 739 (1978).

Secondly, Colgate contends that competition between the defendant and the plaintiff is essential before a defendant may be found guilty of an unethical trade practice and that UR has failed to allege that either Colgate or Rivianna Foods is currently in competition with UR in the roasted soybean or corn kernel market. Colgate's contention is without merit for at least two reasons. First, UR alleges that Colgate and Rivianna are in competition with it in that Rivianna Foods currently produces various assortments of candies that compete with the snack foods produced by UR. Secondly, Section 75-1.1 nowhere states a requirement that the plaintiff and defendant be in actual competition with each other in a particular market. The purpose of the statute outlined in subsection (b) makes clear that the Act is directed toward maintaining ethical standards in dealings between persons engaged in business and to promote good faith at all levels of commerce in North Carolina. Should Colgate have acted with bad faith toward UR and in fact deceived UR, actual competition between Colgate-Rivianna and UR is irrelevant. The relevant fact is whether Colgate deceived UR or treated UR unfairly in furtherance of an *intent* to compete with UR. Actual competition is not necessary.

Finally, Colgate argues that *State ex rel. Edmisten v. J. C. Penny Company*, 292 N.C. 311, 233 S.E.2d 895 (1977), indicates that under North Carolina law Colgate's

action will be held to be outside the scope of Section 75-1.1:

> "Another state supreme court has held, in construing statutory language identical to that of G.S. 75-1.1(a), that only acts or practices 'designed to effect a sale are covered. *Johnston v. Beneficial Management Corp.*, 85 Wash.2d 637, 538 P.2d 510 (1975)." 292 N.C. at 319, 233 S.E.2d at 900.

The acts of which UR complains center around (a) the failure of Colgate to give UR notice of termination of the contract, (b) Colgate's refusal to reconvey the assets originally purchase by Colgate from UR and (c) the secret decision by Colgate not to market BAMBEANOS. Colgate argues that these actions are clearly not "designed to effect a sale." Accordingly, Colgate, relying on *Penney*, contends that its acts are not covered by the statute. The court disagrees.

To begin with, the quotation from *Penney* is mere *obiter dictum* not binding on any court. This becomes more clear when the language is contrasted with other language in the *Penney* decision. The majority decision in *Penney* stresses that G.S. 75-1.1 covers activities "surrounding" or "affecting" a sale, or unfair and deceptive acts involved in the exchange of goods. *Penney*, 292 N.C. at 316-17, 233 S.E.2d at 899. The cogent dissents filed by Justices Exum and Huskins emphasize this. *Id.*, 292 N.C. at 324, 233 S.E.2d at 903. In order for an activity to be covered by the Unfair Trade Practices Act, it need only "surround" or "affect" a sale; it need not meet the stricter standard of also inducing a sale.

Colgate's alleged activities "affected" or "surrounded" the sale in at least two respects. First, they caused a termination of all binding obligations under the sales contract save for various provisions regarding the return of assets and payment for improvements. Few

things more "affect" a sale than the cessation of all legal obligations flowing from the sales contract.

Secondly, Colgate's termination of the sales contract would "affect" the original sale in that title to the assets, originally placed in the name of Colgate by the sale, would revert to UR, thereby depriving the original sale of a prerequisite of its validity under the Uniform Commercial Code. N.C.G.S. § 25-2-106(1).

In contrast, the defendant's actions in *Penney* did not "affect" a sale, much less induce a sale. *Penney* involved an attack by the Attorney General against various debt collection activities by J. C. Penney Company. *Penney* presumably sold consumer products to individual buyers on credit and would enforce payment under the terms of a retail installment sales contract or a title-retaining security instrument. Title to the goods involved in *Penney* remained in the Penney Company at all times by reason of the retail installment sales contract (or, in the alternative, was transferred to the buyer-debtor and by him back to the Penney Company by way of a security agreement). Therefore, any later debt collection procedure by Penney would not "affect a sale" because the legal obligations of the parties and title to property remained unchanged. In the instant case, however, the legal obligations arising under the original sale would end upon termination and the termination would cause a transfer of title.

Accordingly, the court finds that UR's complaint states a claim of unfair trade practices under N.C.G.S. § 75-1.1.

III. *Alleged Illegal Restraint of Trade*

United Roasters alleges that Colgate's actions have restrained UR's ability to continue its production and marketing of roasted soybean products and its ability to pay its debts. UR argues that Colgate's actions consti-

tute a violation of North Carolina's antitrust statutes which provide:

> "§ 75-1.1. Combinations in restraint of trade illegal.—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars ($1,000). (1913, c. 41, s. 1; C.S., s. 2559.)" N.C.G.S. § 75-1.1 (1975 Repl. Vol.).
>
> "§ 75-2. Any restraint in violation of common law included.—Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of G.S. 75-1. (1913, c. 41, s. 2; C.S., s. 2560.)" N.C.G.S. § 75-2 (1975 Repl. Vol.).

Because Section 75-2 incorporates the common law on restraint of trade into Section 75-1, the common law is determinative of at least the minimum scope of Section 75-1. *Rose v. Vulcan Materials Company*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973).[1]

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[1] Unfortunately, there is a relative dearth of case law in North Carolina on the common law of antitrust, but the North Carolina Supreme Court has stated that a court may look to cases applying Section 1 of the Sherman Act (15 U.S.C. § 1) in determining the full reach of Section 75-2 because the two statutes are similarly

Colgate asserts five reasons why it contends that its alleged actions are not within the ambit of the common law or Section 75-2. First, it argues that its alleged deceptive acts are not within the list of various restraints of trade that Professor Aycock describes in an extensive legal article as within the ambit of Section 75-2. Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L.Rev. 199 (1972).[2] However, Professor Aycock gave no indication that he meant his list to be exclusive. Moreover, the North Carolina Supreme Court has stated that any business practice not within the scope of the original common law "Rule of Reason," but alleged to be in restraint of trade on the ground that it is an unreasonable restriction on competition, is illegal, provided that the plaintiff carries the burden of proving unreasonableness. *Rose*, 282 N.C. at 657-58, 194 S.E.2d at 531 (1973). Should UR prove conspiracy to eliminate competition in the specific market of roasted soybean snacks, an actionable conspiracy would be shown under the Sherman Act and, hence, the common law. *E.g., Bushie v. Stenocord Corporation*, 460 F.2d 116, 120 (9th Cir. 1972).

Secondly, Colgate contends that UR has failed to allege a conspiracy as required by Section 75-2. However,

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worded. *Rose*, 282 N.C. at 655, 194 S.E.2d at 530. However, caution must be exercised in doing so because the Sherman Act is in some respects broader than the common law. *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129, *rehearing denied*, 310 U.S. 658, 60 S.Ct. 1091, 84 L.Ed. 1421 (1940). Sherman Act cases are relevant only insofar as they reflect the common law.

[2] "Chapter 75 is primarily directed at non-ancillary restraints of trade, such as price fixing, exclusive territorial arrangements, exclusive dealing, refusals to deal, monopolization, attempts to monopolize, combinations and conspiracies to monopolize, unfair methods of competition, and unfair trade practices." 50 N.C.L. Rev. at 207.

the complaint specifically refers to a conspiracy between Colgate and its subsidiary, Rivianna Foods, to keep UR out of the roasted soybean snack market so that it could not compete with Rivianna Foods.

Thirdly, Colgate contends that UR has failed to allege an essential element of a violation of the "restraint of trade" statute, i.e., public damage. Indeed, the North Carolina Supreme Court has held that an actionable conspiracy to restrain trade must operate to the prejudice of the public, in keeping with the common law's "Rule of Reason". *Rose*, 282 N.C at 656, 194 S.E.2d at 530-31 (1973). Accordingly, public damage must be alleged and proven. However, Colgate has alleged no surprise or prejudice that would result should UR be permitted to amend its compaint to include an allegation of public damage. Accordingly, UR is granted leave to amend its complaint to allege that the public was damaged by Colgate's alleged restraint of trade. *See Metropolitan Federal Savings & Loan Association of New York v. East Brooklyn Savings Bank*, 319 F.Supp. 393, 395 (E.D.N.Y. 1970).

Colgate's fourth contention attacks the legal sufficiency of any allegation by UR of a monopoly between Colgate and Rivianna Foods of the soybean snack market. True, the complaint does not reveal an allegation of a monopoly, but rather a conspiracy to destroy any potential competition, but the gravamen of the complaint is not actual monopoly but rather an attempt by Colgate-Rivianna to enhance its ability to monopolize should it decide to do so.

Finally, Colgate contends that the complaint is legally insufficient because it fails to allege that either Colgate or Rivianna was in actual competition with UR in the soybean snack food market. Colgate argues that such failure renders the complaint legally insufficient because the plaintiff-victim and the defendant-conspirator must be in actual competition with each other in order to sup-

port a claim under the common law of restraint of trade. Although Colgate cites no cases in support of this proposition, the court finds language in two cases that seems to do so. *See Thomson Newspapers, Inc. v. Toledo Typographical Union No. 63, ITU*, 387 F.Supp. 351, 354 (E.D. Mich. 1974); *Texasgulf, Inc. v. Canada Development Corporation*, 366 F.Supp. 374, 407 (S.D.Tex. 1973).

However, Colgate's final contention must fail because UR in fact alleges competition between UR and Colgate-Rivianna in that Rivianna's present production of candy foods directly competes with the roasted soybean and corn kernel snack market. Moreover, despite the language of the cases cited, the court is not convinced that actual competition between the plaintiff and the defendant must be shown in order to establish a valid claim of common law restraint of trade. Cases applying the Sherman Act stress that the proper focus is upon the challenged restraint's impact on competitive conditions. "The true test of legality is whether the restraint imposed . . . may suppress or even destroy competition." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). So long as the defendant willfully engaged in acts that are calculated to destroy competition in a particular market, it is irrelevant whether the defendant is actually engaged in the market. Only an intention and capacity to compete by Colgate or Rivianna against UR is essential; actual competiton need not be shown. *Cf.*, *American Football League v. National Football League*, 205 F.Supp. 60, 65 (D.Md. 1962), *aff'd*, 323 F.2d 124, 132 n.18 (4th Cir. 1963) ["dangerous probability" that defendant will or intends to monopolize a market is sufficient to show a violation of Section 2 of the Sherman Act; actual monopolization is not necessary;][3] *see Times-*

[3] *Rose v. Vulcan Materials Company*, 282 N.C. 643, 194 S.E.2d 521 (1973), does not expressly preclude the use of cases applying

Picayune Publishing Company v. United States, 345 U.S. 594, 626, 73 S.Ct. 872, 980, 77 L.Ed. 1277 (1953).

The conclusion is that the allegations of Count 5 of the complaint are sufficient to state a violation of Sections 75-2 and 75-1 of the North Carolina General Statutes. An order accordingly will be entered.

Section 2 of the Sherman Act, which deals with monopolies. Section 2 supplements and reflects Section 1's proscription on illegal restraints of trade, and therefore reflects to some extent the common law. *Cf., Standard Oil Company v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

UNITED STATES DISTRICT COURT
E. D. North Carolina
Raleigh Division

No. 77-184-CIV-5

UNITED ROASTERS, INC.,
Plaintiff,

v.

COLGATE-PALMOLIVE COMPANY,
Defendant.

Jan. 23, 1980

Memorandum of Decision and Order

MALETZ, Judge.*

Upon consideration of the record, the findings of the jury, the memoranda of the parties and after oral argument, the court concludes for the reasons that follow (1) that N.C.G.S. § 75.1.1 does not apply to the contract termination transaction in issue; and (2) that even assuming that this statute is applicable, it has not been violated. Accordingly, the court holds that plaintiff's motion for treble damages and attorneys' fees should be denied.

The Statutes

N.C.G.S. § 75-1.1 provides in part:

> *Methods of competition, acts and practices regulated; legislative policy.*—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

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* HERBERT N. MALETZ, Judge, United States Customs Court presiding by designation pursuant to 28 U.S.C. § 293(b).

(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

• • • •

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

N.C.G.S. § 75-16 provides:

Civil action by person injured; treble damages.— If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.[1]

Applicability of Section 75-1.1

Our starting point in determining the scope of section 75-1.1 is *State ex rel Edmisten v. J. C. Penney Co.*, 292

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[1] For comment on these statutes see Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 Wake Forest Intra. L. Rev. 1 (1969); *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L.Rev. 896 (1970); Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L.Rev. 199 (1972).

N.C. 311, 233 S.E.2d 895 (1977). In that case, the Supreme Court of North Carolina held that debt collection activities by J. C. Penney following sales of merchandise by Penney to its credit customers were not within the purview of section 75-1.1 on the basis that the statute is limited to matters that have a reasonable nexus with the actual sales of the goods or services in question.[2] Thus the court in *Penney* stated (233 S.E.2d at 899-900):

> • • • The use of the word "trade" interchangeably with the word "commerce" indicates that a narrower definition of commerce which comprehends *an exchange* of some type was intended. [Emphasis in original.]
>
> • • • •
>
> We believe the unfair and deceptive acts and practices forbidden by G.S. 75-1.1(a) are those involved in the bargain, sale, barter, exchange or traffic.
>
> • • • •
>
> The General Assembly thus, is concerned with openness and fairness in those activities which characterize a party as a "seller."
>
> • • • •
>
> • • • it is only those activities surrounding the "sale" that are regulated by G.S. 75-1.1.
>
> • • • •
>
> • • • the intent [is] to prohibit only unfair and deceptive practices affecting sales.
>
> • • • •
>
> • • • only acts or practices "designed to effect a sale" are covered.

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[2] See also *CF Industries v. Transcontinental Gas Pipe Line*, 448 F.Supp. 475, 484 (W.D.N.C. 1978).

Against this background in *Penney*, the jury in the present case found that:

> 1. The defendant acted in bad faith in exercising its right to terminate the agreement of February 1, 1973. (Special Verdict, Issue # 5).
>
> 2. The defendant decided in the first quarter of 1976 to discontinue performance of the agreement. (Interrogatory # 1).
>
> 3. The defendant did not intentionally deceive plaintiff by failing to advise plaintiff with reasonable promptness of its decision to discontinue performance of the agreement. (Interrogatory # 2).
>
> 4. The defendant unfairly failed to advise plaintiff with reasonable promptness of its decision to discontinue performance of the agreement. (Interrogatory # 3).

The short of the matter is that the breach of contract found by the jury—which is the basis of plaintiff's section 75-1.1 claim—was the failure by the defendant to notify the plaintiff with reasonable promptness of its decision to discontinue performance of the agreement. In that circumstance, the court must conclude that such breach by the defendant was not directed to matters "involved in the bargain, sale, barter, exchange or traffic" of goods and services or to activities surrounding or affecting a sale.

I am quite mindful that at a prior stage of this litigation, Judge Dupree in holding that the allegations of Count 4 of the original complaint in this action were sufficient to state a cause of action under section 75-1.1 stated in part (Memorandum of Decision, *United Roasters, Inc. v. Colgate Palmolive Co.*, 485 F.Supp. 1041, pp. 1046-1047, 1979):

The acts of which UR complains center around (a) the failure of Colgate to give UR notice of termination of the contract, (b) Colgate's refusal to reconvey the assets originally purchased by Colgate from UR and (c) the secret decision by Colgate not to market BAMBEANOS. Colgate argues that these actions are clearly not "designed to effect a sale." Accordingly, Colgate, relying on *Penney*, contends that its acts are not covered by the statute. The court disagrees.

To begin with, the quotation from *Penney* is mere *obiter dictum* not binding on any court. This becomes more clear when the language is contrasted with other language in the *Penney* decision. The majority decision in *Penney* stresses that G.S. 75-1.1 covers activities "surrounding" or "affecting" a sale, or unfair and deceptive acts involved in the exchange of goods. *Penney*, 292 N.C. at 316-17, 233 S.E.2d at 899. The cogent dissents filed by Justices Exum and Huskins emphasize this. *Id.*, 292 N.C. at 324, 233 S.E.2d at 903. In order for an activity to be covered by the Unfair Trade Practices Act, it need only "surround" or "affect" a sale; it need not meet the stricter standard of also inducing a sale.

Colgate's alleged activities "affected" or "surrounded" the sale in at least two respects. First, they caused a termination of all binding obligations under the sales contract save for various provisions regarding the return of assets and payment for improvements. Few things more "affect" a sale than the cessation of all legal obligations flowing from the sales contract.

Secondly, Colgate's termination of the sales contract would "affect" the original sale in that title to the assets, originally placed in the name of Colgate by the sale, would revert to UR, thereby de-

> priving the original sale of a prerequisite of its validity under the Uniform Commercial Code. N.C.-G.S. § 25-2-106(1).

However, the breach of contract found by the jury which, as stated before, is the basis of plaintiff's section 75-1.1 claim (i.e., failure to notify plaintiff with reasonable promptness of its decision to discontinue performance of the agreement' did *not* cause a termination of all binding obligations under the sales contract and did *not* cause title to the assets to revert to plaintiff. It is to be observed in this regard that under paragraph 13(B) of the agreement, which was found by the jury to be applicable, defendant had the absolute right to terminate further performance of the agreement at any time upon 30 days written notice to the plaintiff.

In this setting, the particular breach of contract found by the jury did not cause the parties to cease performance under the agreement. The breach only concerned whether defendant gave notice that it was terminating performance.

Second, the contract provision itself specifically states that the parties will continue to have legal obligations under the contract. For example, defendant had the legal obligation to reconvey the assets to plaintiff under the provisions of paragraph 14 of the agreement.

It was also established that the particular breach found by the jury did not cause an automatic reversion to plaintiff of title in the assets. On the contrary, under paragraph 14 of the agreement defendant was required to reconvey the assets before plaintiff regained title thereto. Paragraph 14(A) of the agreement reads as follows:

> Upon termination of this Agreement as set forth in Section 13(B), Purchaser shall reconvey to Seller

> all those assets agreed to be conveyed in this Agreement by Schedules A, B, and C hereinabove * * *.

Further, the failure of defendant to give prompt notice of its decision to terminate performance did not affect the title to the assets.

Judge Dupree in his *Memorandum of Decision* (pp. 1046-1047) concluded that the debt collection procedure alleged to be unfair in *Penney* did not "affect a sale" because the legal obligations of the parties and title to property remained unchanged. As stated by Judge Dupree (*ibid.*):

> * * * [T]he defendant's actions in *Penney* did not "affect" a sale, much less induce a sale. *Penney* involved an attack by the Attorney General against various debt collection activities by J. C. Penney Company. Penney presumably sold consumer products to individual buyers on credit and would enforce payment under the terms of a retail installment sales contract or a title-retaining security instrument. Title to the goods involved in *Penney* remained in the Penney Company at all times by reason of the retail installment sales contract (or, in the alternative, was transferred to the buyer-debtor and by him back to the Penney Company by way of a security agreement). Therefore, any later debt collection procedure by Penney would not "affect a sale" because the legal obligations of the parties and title to property remained unchanged. * * *

In the *Penney* case as in this case, a change in title to the assets was possible but was not brought about by the particular acts alleged to be unfair under section 75-1.1. As in the *Penney* case, the actions alleged to be unfair under section 75-1.1 in this case did not change the legal obligations of the parties or cause a change in title to

the assets. Therefore, the activities of defendant as found by the jury did not "surround" or "affect" a sale.[3]

Plaintiff further argues that a 1977 enactment of the North Carolina General Assembly which enlarged the definition of "commerce" in section 75-1.1 to include *all* business activities (save for professional services) should be construed retroactively so as to be applicable to the claimed unfair or deceptive practices that occurred in 1976. More specifically, H.B. 1050 was introduced almost immediately after the decision in *Penney* to "*REVIVE* AND IMPROVE CERTAIN PROVISIONS OF CHAPTER 75 OF THE GENERAL STATUTES, TO PROTECT THE CITIZENS OF NORTH CAROLINA FROM UNFAIR, UNETHICAL, DECEPTIVE AND UNSCRUPULOUS BUSINESS PRACTICES." [Emphasis added.]

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[3] Judge Dupree in his *Memorandum of Decision* added (p. 1047) that "[i]n the instant case * * * the legal obligations arising under the original sale would end upon termination and the termination would cause a transfer of title" In rendering this decision, Judge Dupree treated defendant's motion for partial summary judgment as a motion to dismiss and hence necessarily construed the allegations of the complaint most favorably to the plaintiff. These allegations (which were superseded by an amended complaint) complained in prolix terms about defendant's misconduct in connection with the termination of the agreement. By contrast, at trial the gravamen of plaintiff's case on the termination issue was that defendant, acting in bad faith, had unfairly failed to advise plaintiff with reasonable promptness of its decision to discontinue performance of the agreement—and the jury so found. The point is that this breach did not cause a transfer of title nor affect or surround a sale.

What is more, even were it to be assumed that Judge Dupree's opinion may be construed as holding that the particular breach here involved "affected" or "surrounded" a sale, the law of the case "doctrine is not an inexorable command that rigidly binds the court to its former decisions, but rather is an expression of good sense and wise judicial practice. * * *." *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974).

As rewritten by Chapter 747 of the North Carolina Session Laws of 1977, N.C.G.S. 75-1.1 provides:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "*commerce*" *includes all business activities, however denominated,* but does not include professional services rendered by a member of a learned profession. [Emphasis added.]

In addition, section 5 of Chapter 747 provided that "[t]his Act shall become effective upon ratification and shall not apply to pending litigation."

With these considerations in mind, plaintiff points out that in *Spencer v. McDowell Motor Co.*, 236 N.C. 239, 72 S.E.2d 598 (1952), the Court was called upon to construe exactly the same language. In that case, McDowell Motor Company argued that certain statutes creating a *prima facie* case of agency against the owner of a vehicle operated negligently by another should not be applied to a cause of action existing prior to ratification but upon which no actual legal proceeding had been commenced. In rejecting that contention, the Supreme Court stated (72 S.E.2d 603-4):

> An action is pending from the time it is commenced until its final determination. And a civil action is commenced by the issuance of a summons * * *.
>
> Moreover, the maxim *expressio unius est exclusio alterius*, that is, that the expression of one thing is the exclusion of another, applies. From the fact that the Legislature expressly provided that the provisions of the Act shall not apply to pending litigation, it may be implied that it should apply in all other cases.

As plaintiff notes, Chapter 747 was ratified and became effective on June 27, 1977, and the present action was commenced by complaint and the issuance of a summons on July 13, 1977. Therefore, plaintiff contends that the language of Chapter 747 applies to the present situation. Additionally, plaintiff points out (correctly) that it is established in North Carolina that retroactive statutes are constitutional, "unless they are such as impair the obligation of contract or disturb vested rights." *Tabor v. Ward*, 83 N.C. 291, 294 (1880). Further, plaintiff makes reference to *Byrd v. Johnson*, 220 N.C. 184, 16 S.E.2d 843 (1941), where the Court quoted the following statement from 16 C.J.2d, Constitutional Law, p. 830 § 383 (16 S.E.2d at 846):

> Statutes directed to the enforcement of contracts, or merely providing an additional remedy, or enlarging or making more efficient an existing remedy, for their enforcement, do not impair the obligation of the contracts. In like manner, an act providing a remedy for the enforcement of an agreement which was theretofore unenforceable is valid.

From the foregoing, plaintiff insists that defendant's obligations under the contract in question were not changed by Chapter 747 of the North Carolina 1977 enactment. For in plaintiff's view that enactment merely provided plaintiff with an additional *remedy* as against defendant for unfair or deceptive acts or practices that took place in 1976.

There are, however, several difficulties with the entire thrust of plaintiff's argument. In the first place, the law in North Carolina is that "[a] statute will not be construed to have retroactive effect unless that intent is clearly expressed or arises by necessary implication from its terms." *In Re Will of Mitchell*, 285 N.C. 77, 203 S.E.2d 48, 50 (1974). Any doubt that arises concerning the legislature's intent should, therefore, be resolved

against retroactivity. The leading North Carolina case construing this issue is *Smith v. Mercer*, 276 N.C. 329, 172 S.E.2d 489 (1970), in which the Supreme Court considered whether certain revisions that liberalized the types of damages recoverable under North Carolina's wrongful death statute should be applied retroactively. The sequence of events in *Smith v. Mercer* was as follows:

March 16, 1968	— Plaintiff's decedent killed.
April 14, 1969	— Wrongful death statute amended to permit, *inter alia*, recovery of punitive damages and damages attributable to loss of companionship.
July 3, 1969	— Action commenced.

As in this case, the General Assembly in *Smith v. Mercer* expressly provided that the amendments (1) were effective upon ratification and (2) that the amendments did not apply to litigation pending on their effective date. Chapter 215, Session Laws of 1969. The Supreme Court, in holding that the amendments of April 14, 1969 had no application to an action for wrongful death where plaintiff's decedent died prior to April 14, 1969, quoted the following from 50 Am.Jur.Statutes § 478 (172 S.E.2d at 494-5):

> *Ordinarily, an intention to give a statute a retroactive operation will not be inferred. If it is doubtful whether the statute or amendment was intended to operate retrospectively, the doubt should be resolved against such operation.* It is especially true that the statute or amendment will be regarded as operating prospectively only, where it is in derogation of a common-law right, or where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right, *or create a new liability in connection with a past transaction, invalidate a defense which was good when the statute was passed, or, in general, render the statute or*

amendment unconstitutional. [Emphasis in original.] (Citations Omitted).

> A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, *or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already passed. Hence, remedial statutes, or statutes relating to remedies or modes of procedure,* which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against a retrospective operation of statutes. To the contrary, statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. [Emphasis in original.]

The *Smith v. Mercer* opinion goes on to distinguish *Spencer v. McDowell Motor Co.*, the case upon which plaintiff principally relies (172 S.E.2d at 495):

> There remains for disposition plaintiff's contention that the decision in *Spencer v. McDowell Motor Co.*, 236 N.C. 239, 72 S.E.2d 598, is authority for the position that the General Assembly intended that the 1969 Act should be applied to deaths which had occurred prior to its effective date. In *Spencer*, this Court held the 1951 statute, which is now codified as G.S. § 20-71.1, applied in the trial of all actions except actions which were pending when the 1951 statute became effective. This 1951 statute related solely to the *prima facie* effect of certain evidence. It did not confer any right of action. It did not enlarge or diminish the substantive rights of any party. Under the general rule, the 1951 statute, which related

solely to a mode of procedure, would have applied to all trials thereafter conducted except for the explicit statement therein that "the provisions of this Act shall not apply to pending litigation." The 1969 Act, which provides solely for substantive changes, to wit, the creation of a new right of action for wrongful death, would not apply retroactively to deaths occurring prior to its effective date without regard to whether such deaths were the subject of litigation then pending. We take notice of this excerpt from the opinion in *Spencer:* "Moreover, the maxim *expressio unius est exclusio alterius*, that is, that the expression of one thing is the exclusion of another, applies. From the fact that the Legislature expressly provided that the provisions of the Act shall not apply to pending litigation, it may be implied that it should apply in all other cases." Seemingly, this statement was appropriate where the statute under consideration related to procedural remedies rather than to substantive rights. However, we hold it may not be considered authoritative with reference to a statute such as the 1969 Act which relates solely to substantive rights and creates a new right of action.

Under the general principles laid down by *Smith v. Mercer*, it is clear that the 1977 amendments to section 75-1.1 constituted a substantive revision intended to expand the potential liability for certain proscribed acts. If applied so as to bring defendant's 1976 claimed unfair or deceptive acts or practices within the ambit of the 1977 amendment, the result would be to "create a new liability in connection with a past transaction" or "invalidate a defense which was good when the statute was passed." Both effects were declared impermissible by the North Carolina Supreme Court in *Smith v. Mercer*, 172 S.E.2d at 494.

Whether Defendant Has Violated Section 75-1.1

Even assuming *arguendo* that section 75-1.1 is applicable, it is concluded that the conduct here in question does not constitute a violation thereof.

Crucial in determining this issue are the four findings of fact made by the jury in connection with defendant's decision to terminate the contract between the parties. For it is damages arising out of this conduct that plaintiff has moved to treble. As stated previously, the jury found that:

> 1. The defendant acted in bad faith in exercising its right to terminate the agreement of February 1, 1973. (Special Verdict, Issue # 5).
>
> 2. The defendant decided in the first quarter of 1976 to discontinue performance of the agreement. (Interrogatory # 1).
>
> 3. The defendant did not intentionally deceive plaintiff by failing to advise plaintiff with reasonable promptness of its decision to discontinue performance of the agreement. (Interrogatory # 2).
>
> 4. The defendant unfairly failed to advise plaintiff with reasonable promptness of its decision to discontinue performance of the agreement. (Interrogatory # 3).

Although the three Interrogatories were not accompanied by jury instructions, the court instructed the jury that Issue # 5 of the Special Verdict arose out of defendant's implied obligation to perform its contract in "good faith." The jury was instructed as follows concerning the meaning of "good faith":

> Good faith means honesty in intention. Good faith also may be said to be synonymous with fair dealing in accordance with the observance of reasonable com-

> mercial standards of fair dealing applicable to the business governed by the contract between the parties.

Hence, if the jury found that *either* "honesty" *or* "fair dealing" was lacking in defendant's conduct, the jury could then find a breach of defendant's implied promise of "good faith." It was not necessary that the jury find both "dishonesty" and "unfair dealing," and, as shown by the Interrogatories, it did not so find.

Applying the above definition of this implied promise to the facts of the instant case, the court summarized its instructions to the jury on Issue # 5 as follows:

> Plaintiff must satisfy you by the greater weight of the evidence of the following things: first, that at some point in time, defendant decided to terminate the United Roasters project; and second, that at such time defendant failed to notify plaintiff of such decision to terminate and wrongfully withheld such decision from plaintiff; and third, that plaintiff's omission to give such notice at the time the decision was made was dishonest and was not in keeping with the observance of reasonable commercial standards of fair dealing applicable to the business of offering roasted soybean snacks for sale to the public.[4]

Upon the jury's determination that defendant had breached its implied obligation to act in good faith (Special Verdict, Issue # 5), the question of whether the

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[4] With regard to this third requirement, it is apparent from the jury's findings considered *in pari materia* that the jury considered the word "and" to be in the disjunctive—and rightly so. For to carry its burden of proof on this third requirement, plaintiff had to establish *either* "dishonesty" or "unfair dealing" and not necessarily both. Thus, notwithstanding the absence of objection, the court's use in its instructions of the word "and" with regard to this third requirement was in error and should have been "or."

jury found that defendant had acted dishonestly or unfairly was resolved by the Interrogatories. It is quite correct that the jury found that the defendant had unfairly failed to advise plaintiff with reasonable promptness of its decision to discontinue performance of the agreement (Interrogatory # 3); however, the jury also found that defendant had not intentionally deceived plaintiff as to its termination decision. (Interrogatory # 2).

From the foregoing, it is clear that while the jury did find a breach of an implied contractual obligation, it expressly rejected the finding of any intentional wrongdoing by defendant. The question raised by Issue # 5 as to whether the jury found that defendant had acted dishonestly or unfairly was resolved squarely by the subsequent Interrogatories when the jury concluded that defendant did not intentionally deceive plaintiff.

It is in this posture that the court must analyze the jury's findings to determine as a matter of law whether a violation of section 75-1.1 has occurred. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975). And in making this determination, it is important to observe that section 75-16—which provides for treble damages—is punitive in nature. As as the Supreme Court of North Carolina stated in *Penney, supra*, 233 S.E.2d at 900:

> While the FTC Act has been held to be remedial, *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919), the North Carolina statute appears to be a hybrid. See Sutherland, supra at § 60.04. It is not criminal, G.S. 75-7. But a statute which imposes *treble* damages can hardly be said to be designed exclusively "for purpose of adjusting the rights of the parties as between themselves." See *Hardy v. Toler, supra*, 288 N.C. at 312, 218 S.E.2d at 348 (Huskins, J., concurring). [Emphasis in original.] [5]

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[5] Specifically, Justice Huskins, concurring in *Hardy v. Toler*, stated (218 S.E.2d at 348): "* * * G.S. § 75-16 is itself *punitive*

Considering that section 75-16 is punitive and considering that the jury found that defendant did not intentionally deceive plaintiff, I must conclude as a matter of law that section 75-1.1 was not violated. For in my view, it is the law in North Carolina that in a private action under section 75-16 to recover treble damages the jury must find intentional wrongdoing before the trial court may rule as a matter of law that section 75-1.1 has been violated. For example, in *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E.2d 801, *cert. denied* 295 N.C. 653, 248 S.E.2d 257 (1978), plaintiffs successfully sued a homebuilder for fraud and for breach of implied and express warranties in connection with the construction and sale of a house. The jury determined that while plaintiffs had been damaged by $16,000, only $3,500 thereof was attributable to the fraud. The trial court refused to treble any of the damages awarded by the jury. The Court of Appeals held that plaintiffs were not entitled to have the entire judgment trebled, but that the trial court should have trebled the $3,500 fraud verdict.[6] The Court of Appeals then stated (245 S.E.2d at 807):

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in nature and provides for the recovery of damages in treble the amount fixed by the verdict." [Emphasis added.] Recently, the North Carolina Court of Appeals concluded that while section 75-16 is punitive, it is not a penal statute. *Holley v. Coggin Pontiac, Inc.*, 43 N.C.App. 229, 259 S.E.2d 1 (1979). *Cf. North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673, 676 (4th Cir. 1960); *Thomas v. Petro-Wash., Inc.*, 429 F.Supp. 808, 813 (M.D.N.C. 1977); *Harris v. Atlantic-Richfield Co.*, 469 F.Supp. 759, 763-4 (E.D.N.C. 1978).

[6] In North Carolina, to establish fraud it is necessary to show "(1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) *made with intent to deceive*; (4) and which does, in fact, deceive; (5) to the hurt of the injured party." [Emphasis added.] *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202, 205 (1951). See also, e.g., *Davis v. Highway Commission*, 271 N.C. 405, 156 S.E.2d 685, 688 (1967).

> There is no authority to support plaintiffs' argument that the remainder of the $16,000, *i.e.*, the portion attributable to damages solely for breach of implied and express warranties, should be trebled. * * * *Breach of such warranties alone does not constitute a "violation of the provisions" of Chapter 75 of the General Statutes.* [Emphasis added.]

Similarly, in *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975), the North Carolina Supreme Court held that section 75-1.1 had been violated upon stipulated factual findings that the Court concluded amounted to fraud in the sale of a used car involving four material misrepresentations. The Court stated (218 S.E.2d at 346):

> Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true. *D. D. D. Corporation v. F.T.C.*, 125 F.2d 679 (7th Cir. 1942). * * *[7]

Finally, in *Love v. Pressley*, 34 N.C.App. 503, 239 S.E.2d 574 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978), the Court of Appeals held that Section 75-1.1

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[7] In contrast to section 75-16 which is punitive, section 5 of the Federal Trade Commission Act (upon which section 75-1.1 is based) is remedial (see, e.g., *Penney, supra*, 233 S.E.2d at 900) and there is no need under the Federal Trade Commission Act to show that the claim or representation was intended to deceive but only that it had the capacity or tendency or effect of deceiving. This is the holding in *D. D. C. Corporation v. F. T. C.* which, as above noted, was cited in *Hardy v. Toler*. See also, e.g., *F. T. C. v. Algoma Lumber Co.*, 291 U.S. 67, 81, 54 S.Ct. 315, 321, 78 L.Ed. 655 (1934). Likewise under State laws based on section 5 of the Federal Trade Commission Act, where remedial or equitable relief is sought by the State, an intent to deceive is not needed. See, e.g., *Commonwealth v. DeCotis*, 366 Mass. 234, 316 N.E.2d 748 (1974). It is to be added that there is no private right of action under the Federal Trade Commission Act. *Holloway v. Bristol-Myers Corp.*, 158 U.S.App.D.C. 207, 485 F.2d 986 (D.C.Cir. 1973).

was violated and affirmed an award of treble damages after the jury found that a landlord had committed the intentional torts of trespass and conversion. See also *Harrington Manufacturing Co. v. Powell Manufacturing Co.*, 38 N.C.App. 393, 248 S.E.2d 739, 744, 746 (1978); *cert. denied*, 296 N.C. 411, 251 S.E.2d 269 (1979); *CF Industries v. Transcontinental Gas Pipe Line*, 448 F.Supp. 475, 485 (W.D.N.C.1978).

In the three cases cited above in which North Carolina courts found that section 75-1.1 had been violated, the jury in each case had previously found (as the parties in *Hardy v. Toler* had stipulated) an intentional tort. In none of those cases did the North Carolina appellate courts hold that breach of contract alone was sufficient to establish a section 75-1.1 violation, and in *Stone v. Paradise Park House, supra*, the Court of Appeals affirmatively held to the contrary.[8]

Moreover, given the fact that section 75-16 is punitive in nature, the requirement of a jury finding of intentional wrongdoing to constitute a violation of the statute is consistent with the position of the courts of North Carolina generally concerning punitive damages. Thus North Carolina courts have long held that punitive damages may be awarded for intentional wrongdoing but not for breach of contract alone. See, e.g., *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 229 S.E.2d 297, 302 (1976); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611, 621-

[8] It is worthy of note that Massachusetts has a statute covering unfair acts or practices which is somewhat similar to the North Carolina statute. See *Hardy v. Toler, supra*, 218 S.E.2d at 346. The Massachusetts Supreme Judicial Court has held that in a private action to recover multiple damages there must be an intentional, willful or knowing violation of the Act. *Heller v. Silverbranch Construction Corp.*, —— Mass. ——, 382 N.E.2d 1065, 1070 (1978); *Linthicum v. Archambault*, —— Mass. ——, —— Mass. Adv.Sh. 2661, 2668 (1979), 398 N.E.2d 482. See also Brown, *Unfair Acts*, N.Y. Law Journal, Jan. 10, 1980, p. 4.

3 (1979). As stated in *Newton* (229 S.E.2d at 302); "North Carolina has consistently allowed punitive damages solely on the basis of its policy to punish intentional wrongdoing and to deter others from similar behavior." [9]

Plaintiff, however, contends that constructive fraud exists here and is sufficient to support an award of treble damages. I cannot agree.

In North Carolina, "[l]egal or constructive fraud has not been precisely defined. It rests upon public policy and is based upon *breach* of a *fiduciary obligation.* It does not necessarily involve conscience or moral dereliction, and *intent to deceive and actual dishonesty are not required.* It exists when there is a breach of legal or equitable duty which tends to deceive others or violates public or private confidence." [Emphasis added.] Strong's *North Carolina Index 3d, Fraud* § 7.

North Carolina courts apply the doctrine of constructive fraud only after there has been a finding, supported by adequate evidence, that a special confidential or fiduciary relationship existed between the parties with respect to the transaction of property brought into question. *Stone v. McClam,* 42 N.C.App. 393, 257 S.E.2d 78 (1979), *cert. denied,* 298 N.C. 572, 261 S.E.2d 128 (1979). Upon the finding of such relationship, the burden of proof is shifted to the fiduciary to prove that he acted fairly and in good faith. *Id.,* 257 S.E.2d at 83.

---

[9] The Court in *Newton* concluded that punitive damages are permissible in "simple" fraud cases since "actionable fraud by its very nature involves intentional wrongdoing." 229 S.E.2d at 302. Hence in the present case Judge Dupree denied plaintiff's motion to amend its complaint to add a fraud claim on the ground that "the proposed fraud claim is merely repetitious of counts already stated in the original complaint, and since an ample statutory remedy is already provided in lieu of punitive damages, the addition of the fraud claim would be inappropriate." Order of April 3, 1979.

North Carolina courts have generally limited the application of the doctrine of constructive fraud to certain known and definite fiduciary relationships, although *Stone* applied the broader concept of "special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of one reposing confidence." *Ibid.* Specifically, however, *Stone* held that a debtor-creditor relationship in a commercial context was not a fiduciary relationship. *Id.*, 257 S.E.2d at 84.

It is true that *Priddy v. Kernersville Lumber Company, Inc.*, 258 N.C. 653, 129 S.E.2d 256 (1963)—which is relied upon by plaintiff—differs from the usual requirement that a fiduciary relationship exist in order for constructive fraud to be applicable. In *Priddy*, a supplier of construction materials consistently furnished nominal or token materials immediately prior to the date on which his materialman's lien would have expired for the purpose of extending his lien. Strong's *North Carolina Index 3d, Fraud* § 7, analyzes *Priddy* as follows:

> The acts of the owner and material furnisher in ordering and supplying small items after completion of the contract for the sole purpose of extending the time within which the materialman might file his lien constitutes constructive fraud as to persons acquiring subsequent liens long after the expiration of the time apparently required for the filing of materialmen's liens.

Thus, *Priddy* dealt with public policy considerations whereby the Court prevented the reliability and integrity of public records from being abused and undermined by a scheming materialman, irrespective of his motive. The Court in *Priddy* stated that the materialman's attempts so to extend the lien constituted constructive fraud. But nothing remotely resembling *Priddy* appears in the pres-

ent case. Further, in *Priddy* punitive damages were not sought by the plaintiff nor discussed by the Court.

Applying the doctrine of constructive fraud to the case here, it is clear that there was no fiduciary relationship between the parties. The fact that the parties contracted with each other is not a ground on which to assert a fiduciary relationship. In addition, no issue of fiduciary relationship was ever raised by plaintiff or submitted to the jury. Thus, in the absence of a finding of fiduciary relationship, the doctrine of constructive fraud cannot be applied to this case. Also, it should be noted that the transaction complained of here (i.e., failure to give notice of a termination decision) does not itself involve a transfer of property. Hence, the remedy of constructive fraud—the setting aside of or giving damages for the transfer—is not applicable here.

Moreover, even if there had been a finding of fiduciary relationship, involving a transfer of property, the procedure triggered by the doctrine of constructive fraud—that of shifting the burden of proof concerning fairness and good faith to the fiduciary—is completely different from the treble damage remedy requested by the plaintiff here.

Attorneys' Fees

N.C.G.S. § 75-16.1 provides in part:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> > (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party

> to pay the claim which constitutes the basis of such suit; * * *

But since the court holds (1) that N.C.G.S. § 75-1.1 does not apply to the contract termination transaction in issue; and (2) that even assuming this statute is applicable, it has not been violated, it of course follows that the award of attorneys' fees pursuant to section 75-16.1 is not permissible.

Order

In view of the foregoing, plaintiff's motion for treble damages and attorneys' fees is hereby denied.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 77-184-CIV-5

UNITED ROASTERS, INC.,
Plaintiff,

v.

COLGATE-PALMOLIVE COMPANY,
Defendant.

[Filed Dec. 10, 1979]

PARTIAL JUDGMENT

This action came on for trial before the Court and a jury, Honorable Herbert N. Maletz, Judge of the United States Customs Court, presiding by designation, and the Court having instructed the jury to find by special verdict, and the jury having duly found such special verdict as follows:

1. Did plaintiff and defendant intend that the following provisions of their agreement dated February 1, 1973 would prohibit defendant from test-marketing roasted soybeans beyond the two-year period ending August 31, 1975?

> Paragraph 1(F)(i)—"The purchase price shall be four percent (4%) of the gross sales dollars (less returns and allowances, any local sales or use taxes paid by Purchaser and transportation charges paid by Purchaser) received by Purchaser on the sale of roasted soybeans produced by the Process for a two (2) year period commencing September 1, 1973, and ending as

of the end of August, 1975. Such amount shall not be less than One Hundred Thousand Dollars ($100,000.00) or more than Two Hundred Thousand Dollars ($200,000.00), for such two-year period. . . .

and

Paragraph 1(F)(iii)—If Purchaser continues to market roasted soybeans produced by the Process subsequent to September 1, 1975, Purchaser shall pay Seller the greater of (a) or (b) for each year commencing September 1, 1975, for a period of twenty-five (25) years or such period of time as Purchaser continues to market such roasted soybeans produced by this Process, whichever period is less:

(a) Four percent (4%) of gross sales dollars (as defined in subsection 1(F)(i) hereinabove) received by Purchaser on the sale of roasted soybeans produced by the Process but not more than Two Hundred Thousand Dollars ($200,000.00) each year; or

(b) seven percent (7%) of gross profits (as hereinafter defined) derived from the sale of roasted soybeans utilizing the Process after deducting the first Two Million Dollars ($2,000,000.00) of gross profits each year. . . ."

ANSWER OF JURY: Yes.

2. If your answer to # 1 is "Yes," did plaintiff's and defendant's agreement to extend the test-marketing period on February 20, 1976 extend the applicability of Paragraphs 13(B) and 14(A), as set forth below, until the completion of test-marketing?

Paragraph 13(B)—"Purchaser in its sole discretion may terminate further performance of

this Agreement at any time within the two-year period described in subsection 1(F)(i) hereinabove, upon thirty (30) days written notice to Seller, and none of the parties shall have any liability or obligation one to the other under this Agreement except as provided in Section 4 and except for any amounts which Purchaser may then owe Seller pursuant to Subsection 1(F)(i) hereinabove; provided that in the event of termination before the end of the two-year period described in Subsection 1(F)(i) hereinabove, Purchaser shall continue to make the payments required to be made to Seller under Subsection 1(F)(i).

Paragraph 13(C)—At any time subsequent to the two-year period described in Subsection 1(F)(i) hereinabove and within the period described in Subsection 1(F)(iii) hereinabove, Purchaser if it elects to discontinue marketing the roasted soybeans produced by the Process may terminate further performance of this Agreement within the period described in Subsection 1(F)(iii) hereinabove upon thirty (30) days written notice to Seller, and none of the parties shall have any liability or obligation one to the other under this Agreement except for any amounts which Purchaser may then owe Seller pursuant to Subsection 1(F)(iii) hereinabove.

Paragraph 14(A)—Upon termination of this Agreement as set forth in Section 13(B), Purchaser shall reconvey to Seller all those assets agreed to be conveyed in this Agreement by Schedules A, B, and C hereinabove referred to specifically including the Process and all patent, trademark and tradename rights connected with the Process but on an "as is" basis at time of

reconveyance, plus then existing improvements, additions, repairs or replacements thereto."

ANSWER OF JURY: Yes.

3. If your answer to # 1 or # 2 is "No," did plaintiff and defendant intend that the following provisions of their agreement dated February 1, 1973 would mean that plaintiff vould be credited with the first $50,000.00 in improvements and be only required to pay defendant for the net book value of improvements over $50,000.00?

Paragraph 14(B)—"Upon termination of this Agreement as set forth in Section 13(C), Purchaser shall reconvey to Seller all those assets agreed to be conveyed in this Agreement by Schedules A, B, and C hereinabove referred to, but on an "as is" basis at time of reconveyance, plus repairs or replacements thereto, and all such improvements and additions thereto if such improvements and additions have a total value (at original cost) of less than Fifty Thousand Dollars ($50,000.00). In the event that the value (at original cost) of improvements and additions exceeds Fifty Thousand Dollars ($50,-000.00), such improvements and additions shall remain the property of Purchaser, but Purchaser shall convey same to Seller upon payment by Seller to Purchaser of the total net book value of all improvements and additions to the assets to be conveyed by this Agreement, wherever such additions and improvements are located. Provided that the information set out in Section 4, the Process, the patent, tradename, and trademark rights connected with the Process shall be reconveyed to Seller only if all such improvements and additions are conveyed to Seller."

ANSWER OF JURY: No answer required because of the "Yes" answers to paragraphs 1 and 2.

4. Did defendant wrongfully refuse to reconvey the assets to plaintiff?

ANSWER OF JURY: Yes.

5. Did defendant act in bad faith in exercising its right to terminate the agreement of February 1, 1973?

ANSWER OF JURY: Yes.

6. What amount of damages, if any, did plaintiff suffer by reason of defendant's breach of the termination provisions of Paragraph 13 of the agreement?

ANSWER OF JURY: $879,800.

7. If you find that plaintiff suffered any damages from defendant's breach of the termination provisions of Paragraph 13 of the agreement, what portion of such damages could plaintiff have avoided by reasonable effort?

ANSWER OF JURY: $308,000.

8 The plaintiff and defendant have stipulated that Colgate-Palmolive and United Roasters agreed to modify their contract of February 1, 1973, as amended April 16, 1973, regarding United Roasters' obligation to Cameron-Brown Capital Corporation, in consideration of United Roasters allowing and continuing to cooperate in the test-marketing of Bambeanos and Jimmy Crack Corn. Which one of the following agreements did the parties make with respect to this modification.

ANSWER OF JURY: *(a) Defendant agreed to pay the Cameron-Brown Note without expectation of repayment from the plaintiff.*

9. Did the defendant breach the agreement which you have found that defendant made with the plaintiff?

ANSWER OF JURY: *Yes.*

FURTHERMORE, the parties having stipulated and agreed that if the Jury answered Paragraphs 1, 2, and 4 of the Special Verdict "Yes," the Court could enter a verdict for plaintiff on the Reconveyance issue in the amount of $130,000.00.

FURTHERMORE, the parties having stipulated and agreed that if the Jury answered Paragraph 8 of the Special Verdict with choice "a" and Paragraph 9 of the Special Verdict "Yes," the Court could enter a verdict for plaintiff on the Cameron-Brown Note issue in the amount of $88,000 with legal interest from October 31, 1976.

NOW, THEREFORE, it is ordered and adjudged that plaintiff, United Roasters, Inc., recover of the defendant, Colgate-Palmolive, Inc., the following amounts:

(1) *Cameron-Brown Note Issues* (8 and 9)—$88,000, with interest thereon at the rate of six percent (6%) per annum from October 31, 1976 until paid;

(2) *Reconveyance Issues* (1, 2 and 4)—$130,000, with interest thereon at the rate of six percent (6%) per annum, as provided by law, from November 21, 1979 until paid;

(3) . *Termination Issues* (5, 6 and 7)—$571,800, with interest thereon at the rate of six percent (6%) per annum, as provided by law, from November 21, 1979 until paid.

It is further ordered, pursuant to Rule 54, F.R.C.P. that there is no just reason for delay as to these matters, and the Clerk shall enter judgment on these matters.

It is further ordered and adjudged that this Court retains jurisdiction over this matter for the purpose of considering whether plaintiff is entitled to treble damages pursuant to the provisions of N.C.G.S. § 75-1.1 and N.C.G.S. § 75-16 and to attorneys' fees pursuant to the provisions of N.C.G.S. § 75-1.1 and N.C.G.S. § 75-16.1.

This the 7th day of December, 1979.

/s/ Herbert N. Maletz
HERBERT N. MALETZ
Judge, United States Customs
Court presiding by designation
pursuant to 28 USC 293(b)

I certify the foregoing to be a true and correct copy of the original.

J. RICH LEONARD, Clerk
United States District Court
Eastern District of North Carolina

By /s/ Joyce W. Todd
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 77-184-CIV-5

UNITED ROASTERS, INC.,
Plaintiff,

v.

COLGATE-PALMOLIVE COMPANY,
Defendant.

[Filed Jan. 23, 1980]

ORDER

1. Defendant's motion for judgment notwithstanding the verdict is hereby denied.
2. Defendant's motion in the alternative for a new trial is hereby denied.

/s/ Hebert N. Maletz
HEBERT N. MALETZ
Judge, United States Customs
Court presiding by designation
pursuant to 28 USC 293(b)

I certfy the foregoing to be a true and correct copy of the original.

J. RICH LEONARD, Clerk
United States District Court
Eastern District of North Carolina

By /s/ Joyce W. Todd
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 77-184-CIV-5

UNITED ROASTERS, INC.,
Plaintiff,

v.

COLGATE-PALMOLIVE COMPANY,
Defendant.

[Filed Feb. 1, 1980]

FINAL JUDGMENT

The Court having denied plaintiff's motions for treble damages and attorneys' fees, the partial judgment entered December 10, 1979 is adopted as the final judgment in this action.

So Ordered this 31st day of January.

/s/ J. RICH LEONARD, Clerk
at the direction of Hon. Herbert N. Maletz, U.S. Customs Judge, presiding by designation.

I certify the foregoing to be a true and correct copy of the original.

J. RICH LEONARD, Clerk
United States District Court
Eastern District of North Carolina

By /s/ [Illegible]
Deputy Clerk

Opposition

Office-Supreme Court, U.S.
FILED
OCT 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-580

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLGATE-PALMOLIVE COMPANY

Petitioners,

v.

UNITED ROASTERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR UNITED ROASTERS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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COLGATE-PALMOLIVE COMPANY

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v.

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR UNITED ROASTERS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

Petitioner Colgate-Palmolive Company ("Colgate") has petitioned the Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review those portions of the judgment concerning contract performance entered by that Court on May 18, 1981, adverse to Petitioner Colgate and in favor of Respondent United Roasters, Inc. ("United Roasters").[1] The opinion of the Court of Appeals, ("Fourth Circuit's Opinion" or "Opinion"), reported at 649 F.2d 985 (4th Cir. 1981) is attached to the petition as Appendix A. The Order denying Petitioner Colgate's Petition for Rehear-

[1] United Roasters, Inc. is a North Carolina corporation. It has no parent, subsidiary or affiliated corporations.

ing and Suggestion for Rehearing In Banc is attached to the petition as Appendix B. The Opinions of the District Court, reported at 485 F.Supp. 1041 (E.D.N.C. 1979) and 485 F.Supp. 1049 (E.D.N.C. 1979), are attached to the petition as Appendix C. The District Court's Partial Judgment, Order denying Petitioner's Motion for Judgment Notwithstanding the Verdict and in the alternative a New Trial, and Final Judgment are attached to the petition as Appendix D.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 18, 1981. A petition for rehearing en banc was denied on June 15, 1981, and the petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5, United States Constitution:

> No person shall . . . be deprived of . . . property without due process of law; . . . .

Amendment 7, United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

By written contract dated February 1, 1973, Colgate purchased the assets of United Roasters for $100,000 plus a royalty payment on the sales of the roasted soybeans being manufactured by United Roasters ("Bam-

beanos") for 27 years (Pet. App. 55a-56a). In addition, this purchase was subject to an asset reconveyance or reversion clause in the event Colgate "terminated further performance of this Agreement" (Pet. App. 56a-57a).

On July 13, 1977, United Roasters instituted this diversity action in the United States District Court for the Eastern District of North Carolina seeking damages for several breaches of contract. A twelve-member jury sat for 23 days, heard the testimony of 16 witnesses and reviewed thousands of pages of documents on this matter. Applying North Carolina contract law, this jury concluded that Colgate had breached the contract in three specific ways:

1. Colgate acted in bad faith in exercising its right to terminate the agreement on February 1, 1973, and as a result United Roasters was damaged in the amount of $571,800;
2. Colgate wrongfully refused to reconvey the assets to United Roasters and as a result United Roasters was damaged in the amount of $130,000;
3. Colgate breached an agreement to pay a note to the Cameron-Brown Capital Corporation on behalf of United Roasters and as a result, United Roasters was damaged in the amount of $88,000.[2]

After the jury verdict, Colgate moved for a Judgment Notwithstanding the Verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The District Court

[2] Apparently, Colgate does not challenge by its Petition the District Court Judgment with respect to the reconveyance or Cameron-Brown note issues.

received and considered the parties post-trial briefs, then denied Colgate's motion without comment (Pet. App. 62a).

Colgate appealed the Judgment and the Fourth Circuit affirmed by Judgment and Opinion, without dissent (Pet. App. 1a-15a).

Colgate petitioned the Fourth Circuit to rehear the matter asserting that the Judgment had been affirmed upon an "untried legal theory." By Order filed June 19, 1981, the Fourth Circuit denied Colgate's petition for rehearing, no Circuit Judge having requested a poll on the petition for rehearing (Pet. App. 16a). For the reasons set forth herein, United Roasters requests this Court deny the writ of certiorari.

ARGUMENT

Petitioner Colgate asserts "the Fourth Circuit's bizarre proceedings cry out for this Court to exercise its supervisory power" [Pet. 9]. Contrary to this hyperbole, the Fourth Circuit followed "the accepted and usual course of judicial proceedings" and there is no need for this Court to exercise its "power of supervision."

Colgate's Petition fails for three reasons: (1) the "legal theory" Colgate claims was not "tried to the jury" was, in fact, *well tried* by the jury and the Trial Court; (2) an appellate court can affirm a judgment upon grounds different from that relied upon by the Trial Court; and (3) there are no special or important reasons for granting the petition.

I. Upon The Facts Found By The Jury, The Fourth Circuit Properly Affirmed The Judgment Of The Trial Court.

Colgate asserts that "no issue relating to Colgate's alleged non-performance of the contract was submitted to the jury." This assertion does not withstand scrutiny.

The allegations of Count One of the Complaint gave Colgate notice that its failure to market BAMBEANOS after the first quarter of 1976 was a breach of its express and implied contract with United Roasters:

> Contrary to the written correspondence received by United Roasters and the oral assurances given United Roasters by Colgate-Palmolive's various management officials from January of 1976 until July 19, 1977, plaintiff is informed and believes Colgate-Palmolive's senior management secretly decided not to expand BAMBEANOS from the test market *and to discontinue all efforts to market a soybean snack in January, February, March or April of 1976.* United Roasters is further informed and believes that the senior management of Colgate-Palmolive made these decisions and then hid them from United Roasters.
>
> * * *
>
> Thus by its actions, delays, and interferences, *Colgate-Palmolive wrongfully, and in breach of its express and implied contract* has destroyed the marketability of United Roasters' roasted soybean snacks and the goodwill of United Roasters' products and business generally. (Emphasis Added)

Although Colgate characterizes Count One as a "notice of termination claim" [Pet. 3], it actually encompasses much more.[3] In addition to the allegations of Colgate's failure to notify United Roasters of its decision to terminate, Count One also alleges that Colgate decided "to

---

[3] See Part II, *infra*.

discontinue all efforts to market a soybean snack *in* January, February, March or April of 1976." At trial United Roasters presented considerable evidence that Colgate ceased to perform its marketing obligations in the first quarter of 1976 and it was undisputed that United Roasters had no knowledge of the termination until mid-July of 1976.

During argument on Colgate's motion for directed verdict at the close of United Roasters' evidence, the District Court asked counsel for United Roasters the following:

> The Court: You have telescoped a number of counts into Counts One and Three for a claimed breach of the termination provision of the contract?
>
> Mr. House: Correct, Your Honor.
>
> The Court: Paragraph 13.
>
> Mr. House: Right. (Tr. 2943)

Paragraph 13 of the Agreement, to which the District Court referred is the basis for all of the wrongful termination theories advanced by United Roasters and was set out verbatim for the jury's interpretation in the Special Verdict. It reads as follows:

> Purchaser in his sole discretion *may terminate further performance* of this agreement at any time within the two-year period described in §1(F)(i) hereinabove, *upon thirty-days written notice* to the Seller . . . (Pet. App. 56a-57a) (Emphasis Added)

Under this paragraph 13, a breach occurs when (1) notice of termination is not given, and (2) performance has ceased. In other words, notice and performance go hand-in-hand; they are not separable breaches under paragraph 13.

Later during the arguments for directed verdict, the Trial Court required United Roasters to set forth in detail *the* theory underlying United Roasters claim of wrongful termination. The following summary by counsel for United Roasters dispels Colgate's argument that it did not have notice that "non-performance" was an essential element of the wrongful termination issue:

> On termination, we contend that the defendant made a decision — or made as close to a decision as you can make — in February or January-March of 1976, to terminate the contract if the Riviana merger went through, or to terminate the contract at that time for what reasons we are not absolutely certain of; that it continued to show a facsimile of performance in order to get us into a better — or worse position as far as bargaining power; that there were appearances of something going on.
>
> It appeared to us that everything was going forward. But behind the scenes, they had made a decision. *And in actuality, the crucial things that should be going on to maintain a test market were not occurring, such as* advertising support, such as having the product in distribution, keeping it in distribution, keeping it on the stock, and such as telling us the fact that it was going to go out of distribution before they ever told us the fact that they were terminating us.
>
> *Those crucial things were not done. And those crucial things were in line with the performance decision to save all the money they could,* so that when the termination date occurred, they would have no expenses left outstanding. (Tr. 3020-1) (Emphasis Added)

Also during this argument on directed verdict, counsel for Colgate summarized precisely the legal theory Colgate now contends it did not litigate:

> On the issue of performance. They *are now asking the Court to submit to the jury an issue that we did not perform the contract between* February and July; . . . (Tr. 3011) (Emphasis Added)

The District Court denied Colgate's motions for directed verdict as to the alleged breach of Article 13 of the termination provisions found in both Count One and Count Three.

After these arguments on directed verdict, Colgate presented evidence. Much of the evidence presented by Colgate was directed towards rebutting United Roasters' assertion that Colgate stopped performing during the first quarter of 1976. For example, Mr. Taney, an outside advertising executive from New York, was called to testify at length about his promotional activities during this particular period of time.

Again during opening argument to the jury, counsel for United Roasters argued that a wrongful termination had occurred because Colgate had ceased performance in the first quarter of 1976 without notifying United Roasters it was so doing. (Tr. 3354-3375)

In response to United Roasters' opening argument, counsel for Colgate argued to the jury:

> Now, the plaintiffs would have you believe that in February of 1976, Colgate had quit trying to sell soybeans and quit performing under this contract. I submit to you that you know from the evidence in this case that that is not true. (Tr. 3427) (Emphasis Added)

Despite this exhortation, the jury agreed with United Roasters and found that Colgate acted "in bad faith in exercising its right to terminate the agreement of February 1, 1973." In addition, the jury answered three special interrogatories regarding this "bad faith" conduct and the answers to two of those demonstrate clearly that the jury had found that Colgate had stopped performing in the first quarter of 1976:

1. The defendant decided in the first quarter of 1976 to discontinue performance of the agreement (Pet. App. 45a).

* * *

3 The defendant unfairly failed to advise plaintiff with reasonable promptness of its decision to discontinue performance of the agreement (Pet. App. 45a).

From the foregoing, it is apparent that the question of non-performance was a crucial element of the wrongful termination issue, was vigorously contested by the parties, and was ruled upon by the jury. Thus, the Fourth Circuit correctly pointed out that the jury found that Colgate had ceased performance of the contract in the first quarter of 1976 (Pet. App. 8a) and properly affirmed.

II. The Fourth Circuit Is Not Bound By The Legal Theory Relied Upon By The Plaintiff Or The District Court.

Far from bizarre, this case conforms to the general rule that the Courts of Appeal may premise affirmance upon a ground or theory other than the one upon which a lower court based its judgment. "The rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1930). *See California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 71 (1974); *Allen* v. *Board of Elections*, 393 U.S. 544, 554 (1969); *J. E. Riley Investment Co.* v. *Commissioner*, 311 U.S. 55, 59 (1940). The courts of appeals have followed this mandate in a number of cases. *See, e.g., Stockton* v. *Lucas*, 482 F.2d 979, 985 (Emer. Ct. App. 1973); *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248, 250-51 (4th Cir. 1971); *United States* v. *Rose*, 346 F.2d 985, 989 (3d Cir. 1965); *Horton* v. *Moore-McCormack Lines, Inc.*, 326 F.2d 105, 108 (2d

Cir. 1964); *Southard* v. *Southard*, 305 F.2d 730, 732 (2d Cir. 1962). Thus the Fourth Circuit has not departed, as Colgate argues, from the accepted and usual course of judicial proceedings.

The Fourth Circuit noted that the District Court compelled United Roasters to elect one of three alternative Counts for breach under the termination provisions of paragraph 13. When forced, United Roasters chose to proceed under Count One because that Count contained not only an allegation of non-performance but also an allegation of deception. This choice was made to preserve United Roasters' claim for treble damages under the North Carolina Unfair Business Practices or Little FTC Act, N.C.G.S. § 75-1.1. (Pet. App. 32a-33a).

As both the District Court's Opinion (Pet. App. 50a) and the Fourth Circuit's Opinion (Pet. App. 14a) deciding United Roasters motion for treble damages stated, something more than a mere breach of contract is necessary under North Carolina law to establish a violation of N.C.G.S. § 75-1.1. Although both courts have now held to contrary, United Roasters believed that the non-performance breach coupled with the deception also set out in Count One would support a motion for treble damages.

Rather than abandoning Count Three, both the Trial Court and counsel for United Roasters described Count One as a "telescoping" of several counts into the "claimed breach of the termination provision." The non-performance breach as set forth in Count Three was without the added factor of deception. For this reason, the facts sustaining Count Three are really the non-performance subset of the larger non-performance and deception theory of Count One. Writing for the Fourth Circuit, Judge Haynsworth noted that the two Counts are

"simply alternate theories based upon the same set of operative facts" (Pet. App. 10a) and "the direct evidence of non-performance by Colgate is the circumstantial evidence upon which United Roasters attempted to found its bad faith termination claim" (Pet. App. 11a).

As this Court has recognized, an Appellate Court should affirm the decision of a lower Court if the result is correct even though the lower Court relied upon a different ground or gave a different reason. *Jaffke* v. *Dunham*, 352 U.S. 280 (1957), *Brown* v. *Allen*, 344 U.S. 443 (1953), *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943), *J. E. Riley Investment Co.* v. *Commissioner*, 311 U.S. 55 (1940).

III. There Is No Special Or Important Reason For Granting The Petition

This matter involved disputes over the interpretation of a 49 page Purchase Agreement unique to United Roasters and Colgate. The disputes were settled under North Carolina contract law by a jury after a lengthy trial. The District Court and the Fourth Circuit have sifted through lengthy briefs and long arguments about the facts of this case and neither found reason to change the jury's decision in the slightest manner. Colgate lost and was required to pay a monetary judgment for its wrongful actions in the first quarter of 1976. Now, almost six years later, Colgate has not paid any of this judgment and seeks by this Petition to delay that reconciliation still further.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted, this the 22nd day of October, 1981.

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